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In The
Supreme Court of the United States
October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1554

BRIAN K. BURBINE,

Petitioner, Appellant,

v.

JOHN MORAN,

Respondent, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

[Hon. Bruce M. Selya, *U.S. District Judge*]
Before
Coffin and Bownes, *Circuit Judges*,
and Wyzanski,* *Senior District Judge*.

Paula Rosin for appellant.
Anthony Delbonis, Special Assistant Attorney General, with whom *Dennis J. Roberts, II*, Attorney General, was on brief for appellee.

January 25, 1985

COFFIN, *Circuit Judge*. Petitioner Brian Burbine appeals the denial of his petition for a writ of habeas corpus. Burbine alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the failure of police to communicate to his attorney their plans to interrogate

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* Of the District of Massachusetts, sitting by designation.

him and their failure to tell him that an attorney acting for him at the request of his sister had called to offer his services. Shortly after the call a written, inculpatory statement was obtained from him. This was followed by two others, all of which were used to convict him of murder. The District Court of Rhode Island held, *Burbine v. Moran,* 589 F. Supp. 1245 (D.R.I. 1984), as did a Rhode Island Superior Court and the Supreme Court of Rhode Island, in a 3-2 decision, *State v. Burbine,* 451 A.2d 22 (1982), that Burbine's constitutional rights were not violated.

BACKGROUND

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a parking lot in Providence, Rhode Island. Suffering from injuries to her head, apparently inflicted by a metal pipe found near the scene of the crime, she was hospitalized. Approximately three weeks later, she died.

On March 4, 1984, Burbine left Rhode Island to visit Nancy Jean Sanders James and her brother, Donald Sparks, in their home in Maine. During his stay Burbine told Nancy James that he had met Ms. Hickey in a bar in Providence on the evening of March 2, 1984, and had slapped her "a time or two" after they had driven to a parking lot and she had resisted his advances. Burbine told substantially the same story to Donald Sparks but added that there was some blood on Ms. Hickey when he left her and that he had washed blood from the interior of his automobile the next morning.

A few months later, at about 3:30 p.m. June 29, 1977, police in Cranston, Rhode Island, arrested and charged

three men in connection with a breaking and entering. Burbine was one of them and Donald Sparks another. The third was a man named DiOrio. For purposes of interrogation, they were placed in separate rooms in the detectives' division in the basement of the Cranston police headquarters. It was learned that DiOrio and Burbine lived at 306 New York Avenue. When Detective Ferranti of the Cranston police was informed of this fact, he recalled that he had been told two days earlier by a confidential informant that a man named "Butch" living at 306 New York Avenue was responsible for the death of Mary Jo Hickey. Between 5:00 and 6:00 p.m. Ferranti learned from DiOrio that Burbine was the only "Butch" living at that address. Detective Ferranti then went to the room where Burbine was being held. After Burbine confirmed that as far as he knew he was the only "Butch" residing at 306 New York Avenue, Ferranti informed him of his *Miranda* rights, but at this point Burbine refused to sign a waiver of rights form and refused to say anything further.

At about 6:00 p.m., after obtaining from DiOrio and Sparks statements implicating Burbine in the killing of Mary Jo Hickey, Ferranti called the Providence police to convey what he had discovered. At approximately 7:00 p.m., three officers of the Providence police, Detectives Bernard Gannon and Edward Trafford and their supervisor, Captain Wilson, arrived at the Cranston headquarters and went to the detective division, where they spoke first with Detective Ferranti and then with Sparks and DiOrio.

At approximately 7:45 p.m., Burbine's sister called the Office of the Public Defender to seek legal assistance for him. She asked for Assistant Public Defender Rich-

ard Casparian in particular and remarked that Burbine had missed an appointment with Casparian that afternoon, during which the two were to discuss an unrelated, pending charge against Burbine. As soon as Burbine's sister hung up, the person who taak her call tried to reach Casparian. Once it was determined that he was unavailable, Allegra Munson, another Assistant Public Defender, was contacted and informed of the situation.

What transpired next is probably best summarized in the words of the Supreme Court of Rhode Island.

> "At approximately 8:15 p.m., Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder." *State v. Burbine*, 451 A.2d at 23-24.

Who at the headquarters was speaking to Ms. Munson has never been determined. All of the identified officers denied receiving or knowing about the call. Burbine was never told of Munson's call, her offer of assistance, or the information that was given her.

At approximately 9:00 p.m., Burbine was brought to the main room in the detective division where Ferranti

and his immediate superior, Lientenant Ricard, and the three Providence officers had gathered. After being advised of his rights, he was asked about the Hickey killing and, appearing "fidgety", denied involvement. He was then returned to the smaller room. About ten minutes later, Ferranti heard repeated banging on the door of that room and went to speak with Burbine. He was crying and said he was "disgusted", "sorry", and wanted to make a statement. Ferranti went to get two of the Providence officers, Detectives Gannon and Trafford, and the three of them brought Burbine to the main office to take a statement. The detectives then read Burbine his *Miranda* rights, ascertained that he understood what his rights were, and at about 9:30 p.m. obtained his signature on a waiver-of-rights form.[1] He was later described as having been "shaky, in tears", but as having spoken clearly. For the next fifty minutes Detective Gannon conducted the interrogation, typing his questions and Burbine's answers. At 10:20 p.m., Burbine signed a typed, four-page, inculpatory statement and Detective Ferranti "notarized" it.

Burbine was then returned to the smaller room and given food. Sometime between approximately 10:45 p.m. and 11:00 p.m., he said he had omitted some information and was returned to the main room. He was again read his *Miranda* rights and gave a second statement. This one was signed at 11:20 p.m.

Finally, at approximately noon the following day, June 30, 1977, having been taken to the Providence head-

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1. Although Burbine's testimony differed sharply from that of the police as to whether he waived his rights and as to other aspects of the interrogation, the Superior Court found the police's version to be more credible.

quarters, Burbine gave a third inculpatory statement, this time to Detective Trafford. At 12:05 p.m., while this final statement was being taken, Trafford's superior, Major John Leyden, called the Office of the Public Defender to request the presence of an attorney for an identification lineup that was to follow. Later that day, Assistant Public Defender Casparian came to the Providence headquarters and assisted Burbine during the lineup.

At the subsequent hearing on Burbine's motion to suppress his three written statements, the Superior Court found that Ms. Munson did make the phone call, as described above, but also "that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney. . . .'" *State v. Burbine,* 451 A.2d at 24. It also found that Burbine was not threatened, coerced, or promised any benefits in exchange for his statements and that Burbine had "knowingly, intelligently and voluntarily waived" his right to counsel and his privilege against self-incrimination. *Id.* In accordance with these findings, the court denied Burbine's motion to suppress. Burbine was subsequently convicted of first degree murder on the basis of his three statements and the testimony of Nancy James, Donald Sparks, and other witnesses.

Burbine appealed the denial of his suppression motion to the Supreme Court of Rhode Island, which affirmed the lower court's decision by a 3-to-2 vote. Burbine then petitioned the United States District Court of Rhode Island for a writ of habeas corpus, alleging Fifth, Sixth, and Fourteenth Amendment violations. The district court reviewed the record of the state proceedings and denied the petition. On appeal, Burbine challenges the district court's conclusions on all three claims.

ANALYSIS

A natural starting point for us is *Fuentes v. Moran*, 733 F.2d 176 (1st Cir. 1984), where we dealt with another case of the securing of inculpatory statements from a suspect in custody after an attorney had called the police station. In that case we found no violation of constitutional rights.

The facts there were as follows. Two days before Fuentes gave his inculpatory statements, the police called an attorney known to have represented Fuentes in past matters and asked the attorney Fuentes' whereabouts so that he might be questioned about the disappearance of two sisters. The police said that he was not a suspect but was wanted for questioning. One day later, he was arrested pursuant to a bench warrant for failure to pay an unrelated fine. The next day officers discovered the bodies of the sisters and called the police station to see if Fuentes was still in custody and discovered that he was. Shortly thereafter, and before the critical interrogation concerning the two women began, Fuentes' attorney called, ascertained that Fuentes was in custody, asked how Fuentes' release could be obtained, and was told that the two officers who could answer that question (including the one who had told the attorney that he wanted to question Fuentes about the disappearance of the two sisters) were not in at the moment. The attorney asked no more questions and made no requests of the police officer to whom he was speaking. Instead, he chose to attend to other business and did not call back to check with the police for four hours. When he did, he learned that Fuentes had confessed during an interrogation that began when the

two investigating officers returned to the station, which was approximately thirty minutes after the attorney had last called. *Id.* at 178-79.

In rejecting Fuentes' Sixth Amendment claim,[2] we held that the first call, in which the police had said Fuentes was not a suspect, was neither "an attempt to deceive, [nor] deceiving". *Id.* at 180. The content and context of that phone conversation had been such that both the attorney and the police knew that the attorney had all the information necessary to assess his client's predicament. As for the second telephone conversation between the attorney and the police, we acknowledged the possibility that there had been some dissimulation on the part of the police but "on balance" rejected "the contention that the failure to fully inform [the attorney] was a harmful deception." *Id.* We noted, moreover, that counsel's failure to take any action whatsoever in his client's interests for four hours "undermine[d] any claim that the police had an obligation to keep him fully informed." *Id.*

In rejecting Fuentes' Fifth Amendment claim that his *Miranda* rights had been violated by the failure of the police to inform him of his attorney's phone call, we held that, since Fuentes had an "ongoing professional relationship" with his attorney, merely failing to say that the attorney had "made a half-hearted inquiry as to Fuentes'

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2. Although in this case we consider only Burbine's Fifth Amendment claim, our observation in *Fuentes* with respect to Fuentes' Sixth Amendment claim are relevant here. They bear directly upon the significance, or insignificance, of the withheld information and upon the presence, or absence, of "any evidence that the accused was . . . tricked. . . ." *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

status . . . [did] not warrant the label 'trickery' and [did] not vitiate Fuentes's fifth amendment waiver." *Id.* at 181. Were Fuentes to have been told of this call and that there had been no subsequent effort by his attorney to call either of the two officers named, it is perhaps not unfair to speculate that more despair than confidence would have been generated.

Nevertheless, we concluded our Fifth Amendment analysis in *Fuentes* with the warning that "some of the questions or contrary inferences we have noted indicate how careful law enforcement officials must be in dealing with suspects and lawyers during the investigatory phase of a prosecution." *Id.* We therefore think it useful to match the critical factors in the case at bar with those in *Fuentes,* to see whether this case falls within or without the proper scope of that decision.

We begin by noting that the district court appropriately recognized that

> Burbine's case is . . . a more compelling one than Fuentes', on almost every score. His educational background and attainment appeared considerably less imposing, his experience with the criminal justice system, while appreciable, was not so wide and varied, his behavior from and after the time of apprehension was a trifle less decisive, and the actions of the constabulary can be viewed as having sailed a little closer to the wind." *Burbine v. Moran,* 589 F. Supp. at 1252-53.

Our task in this review is to ascertain as accurately as we are able whether this case is sufficiently more compelling than Fuentes' so as to make a legal difference.

We are dealing with the primary Fifth Amendment privilege against self-incrimination and the ancillary, sup-

portive "right to consult with counsel prior to questioning . . . [and] also to have counsel present during any questioning if the defendant so desires." *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). The critical legal question is: there having been interrogations of petitioner in the absence of counsel, did petitioner waive his right to consult with counsel during those interrogations? In establishing waiver, the government bears the "heavy burden" of demonstrating "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[3] *Id.* at

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3. We note that although the existence of an attorney-client relationship is not an issue that is before us, having played no part in the parties' briefing or in the district court's decision, it was a major focus in the various opinions of the Justices of the Rhode Island Supreme Court. The majority's conclusion that there was no attorney-client relationship was an important element of its view that failure to reveal the fact of Attorney Munson's call to Burbine would not have "added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver." *State v. Burbine*, 451 A.2d at 29.

On this question we would agree with the Massachusetts Supreme Judicial Court that "it would unduly elevate form over substance" to hold there was no constitutional significance to a police officer's failure to inform an accused of a call from a public defender staff attorney simply because she "had not yet been appointed to represent the defendant in the instant case." *Commonwealth v. Sherman*, 389 Mass. 287, 450 N.E.2d 566, 570 (1983). Here, Burbine had an "ongoing professional relationship with the public defender's office." *Burbine v. Moran*, 589 F. Supp. at 1252. Assistant Public Defender Casparian was already representing him in one matter when his sister called for legal assistance with respect to his arrest and detention on June 29. As Justice Kelleher noted, "the Providence police had no difficulty accepting the public defender as Burbine's duly authorized counsel even though no referral

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475. "Moreover, any evidence that the accused was . . . tricked . . . into waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* at 476.

We also note that, our analysis at this juncture being wholly focused on petitioner's Fifth Amendment rights, not his Sixth Amendment right to counsel, the question is not how badly counsel was misled, but the effect of any misrepresentations on the knowingness and voluntariness of petitioner's waiver of his privilege against self-incrimination and his right to consult counsel thereon. In determining whether his waiver was valid, we are to assess "'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'" *North Carolina v. Butler,* 441 U.S. 369, 374-75 (1979)—(quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)).

We begin with the obvious facts that on June 29, the police informed Burbine of his rights on no fewer than three occasions and twice secured his verbal acquiescence and a sworn-to signature. A similar process took place on June 30. These facts and the fact that Burbine knew that Attorney Casparian and the Public Defender's office were available to him weigh in favor of the validity of the waiver. But they must be viewed in the total context to

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had been made by the Superior Court relating to the homicide case . . . ." *State v. Burbine,* 451 A.2d at 40 (Kelleher, J., dissenting). An attorney-client relationship existed in these circumstances just as surely as one existed in *Fuentes,* where the defendant had retained counsel. To conclude otherwise would be to aid in the creation of "a dual system of justice—one for indigent persons and one for persons fortunate enough to afford private counsel." *Id.*

determine whether the state can be held to have successfully borne its "heavy burden".

We therefore proceed to identify and weigh the remaining factors. We begin with Burbine's educational background, his experience with the criminal justice process, and his conduct during the proceedings. These three factors, as the district court noted, are all more favorable to Burbine than they were to Fuentes. Burbine was 21 with only a fifth grade education; Fuentes had attended Rhode Island Junior College, *Fuentes v. Moran,* 733 F.2d at 181. Although Burbine was currently involved in one criminal matter in which Attorney Casparian was yet to be consulted, as well as the breaking and entering charge on which he had just been arrested, these did not equal the prior exposure of Fuentes. *Id.* As for Burbine's observable behavior, his initial "fidgety" refusal to sign a waiver-of-rights form, his dramatic change of position in the ten minutes between denying involvement and tearfully volunteering to confess were factors not to be found in *Fuentes.*

Still, these differences, while they serve to distance the case at bar from *Fuentes,* do not by themselves carry much weight. This is not the kind of Fifth Amendment case in which direct physical or psychological pressure from the police is claimed to have overborne the will of a suspect. In such a case the factors we have briefly analyzed would have more importance. In the instant case, as in *Fuentes,* however, we must assess, in addition, the extent to which a refusal to inform a suspect of the availability of specific counsel can be said to infect an otherwise valid waiver. The two factors we deemed crucial in *Fuentes* were the fact that what was withheld from

the suspect was information of a "half-hearted", feckless effort to be of service and the fact that the failure to inform the suspect did not sink to the level of trickery or withholding of vital information.

In the case at bar, we have an entirely different situation. Attorney Munson could not be criticized for lack of diligence. Not a novice, she had been in the Office of the Public Defender for six years and had represented over a thousand persons charged with crime. Her call was not routine, but rather took place well after office hours, in mid-evening. When the police operator answered, Munson asked to be transferred to the detective division, which was done. She then inquired whether Sparks and Burbine were being held in custody. On receiving an affirmative answer, she said Burbine was represented by her co-worker Casparian, on whose behalf she was calling. She asked whether the detectives intended either to put Burbine in a lineup or to question him and added that if they did, she would make herself available. Then, according to her testimony, "[t]he officer said [Burbine] was not going to be questioned or put in a lineup, and that they were through with him for the night. . . ." At this point, she had good reason to believe that her mission had been accomplished.

When we come to assess the effect of this phone call on Burbine and the voluntariness of his waiver of counsel during his subsequent interrogations, we take into account three factors: the withholding from Burbine of the fact that Attorney Munson had called; the withholding of the fact that Munson had been told there would be no questioning or lineup that night; and the conduct of the police in effecting the withholding.

Both the district court and the Rhode Island Supreme Court considered only the first factor, the effect of withholding the fact that Munson had called. As the state court put it, "It hardly seems conceivable that the additional information that an attorney whom [the accused] did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver." *State v. Burbine,* 451 A.2d at 29. This seems to us to be an unrealistically narrow focus—to have told Burbine merely that an attorney from the Office of the Public Defender had called would have been to tell half the story, or less. Such information might have had only marginal significance for Burbine. But to have added that the attorney had said she would make herself available that night if police wanted to question him and that the attorney had been told that they were "through with him for the night" would have conveyed a dramatically different message. In the first place it would have told Burbine that the attorney had not made further efforts to see him only because she had been assured that there would be no more questioning that night. In other words, Attorney Munson's efforts would not have appeared halfhearted to him. In the second place, when Detectives Gannon and Trafford sought to interrogate him at 9:00 p.m., Burbine would have known that they were trying to change the ground rules that had just been given Attorney Munson. Instead of first denying all involvement, while appearing "fidgety", then doing a sudden about-face by expressing disgust with himself, crying, and volunteering to confess, he might very well have decided to hold his interrogators to their word as it had been expressed to Munson.

In this regard, we can do no better than repeat Justice Linde's statement, "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." *State v. Haynes,* 288 Or. 59, 72, 602 P.2d 272, 278 (1979), *cert. denied,* 446 U.S. 945 (1980)[4] But perhaps speculation is in these circumstances idle. As Justice Linde concluded his opinion for the court: "When the opportunity to consult counsel is in fact frustrated, there is no room for speculation what defendant might or might not have chosen to do after he had that opportunity." *Id.* at 75, 602 P.2d at 280.

In addition to withholding from Burbine the fact that Munson had called, expressing a desire to be present at any questioning, and the further fact that Munson had been told that no further questioning was planned that evening, we also consider whether or not there was trickery or other blameworthy action by the police. In this case we see no other explanation for the refusal to tell Burbine of Attorney Munson's call than the deliberate or reckless irresponsibility of the person who responded to Attorney Munson's call.

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4. We note that, although the *Haynes* court used the words "actually available", it was not referring to counsel's literal knocking on the door of the police station, but rather his first "telephone call informing the . . . police that he had been asked to represent defendant and was coming to the police station to see him. . . ." *Id.* at 74, 602 P.2d at 279. Of course Attorney Munson's call has the same significance, since her immediate visit was frustrated by the misinformation given her.

In so holding, we do not take issue with the findings of the Superior Court, as far as they go. The court heard contradictory testimony on the matter of the phone call. Ms. Munson testified that she made the call described above. Each of the two Providence police detectives testified that he neither received a call from her nor heard anyone else talking about one. The state emphasized in its testimony that the switchboard would have transferred the call only to Detective Ferranti or Lieutenant Ricard downstairs in the detective division or to the officer in charge of the Cranston station at the time, Captain Del Monico; yet, all of these individuals denied ever receiving or hearing about Ms. Munson's call. The main thrust of the state's case, therefore, was that Ms. Munson had to be lying. The superior court disagreed in part with both sides, finding that Ms. Munson did make the call but also that there was no conspiracy or collusion among the police to mislead either her or Burbine.

Our problem is not that the finding of lack of collusion or conspiracy is unsupported, but that it does not cover the other relevant possible police responses. The first such possibility is that the officer who responded to Munson did so deliberately but without conspiring with anyone. This, of course, would not render the response any less blameworthy or provide the police as a group with a justification for not having fully informed Burbine about the call. *Cf. United States v. Downing,* 665 F.2d 404, 405-07 (1st Cir. 1981) (*Miranda* violation found even though officer conducting second part of interrogation was unaware that suspect had previously told another officer that he wanted to consult an attorney).

A second possibility is that set forth by the Rhode Island Supreme Court and accepted by the district court, i.e., that the apparent incongruity of the findings could be explained by the fact that the Cranston police were investigating one crime, the breaking and entering, while the Providence police were investigating another, the murder of Mary Jo Hickey, and that the recipient of Ms. Munson's call was merely referring to the former. *State v. Burbine,* 451 A.2d at 29-30 n.5.

The problem with this explanation is that it is based on assumptions unsupported by the record. As the police officers' own testimony clearly shows, the two police departments were working hand in hand, in close quarters, concentrating first on DiOrio and Sparks, gathering information to be used in the interrogation of Burbine. Detective Ferranti of the Cranston station was with Burbine and Providence Detectives Gannon and Trafford throughout the evening and played an active role by talking to Burbine several times. Captain Wilson, the senior Providence officer present, exercised general supervision for five hours while the questioning took place in separate rooms. Ferranti's superior, Lieutenant Ricard, was also present and was in and out of Burbine's interrogation room several times. The only other person, according to the police, who could have taken the phone call, Captain Del Monico, stated that he had never received such a call, that if one had been made it would have initially been routed to the detective division, where Ricard and Ferranti were the only two Cranston detectives present, and that, if by error it had been routed to the Captain, he certainly would have transferred it to the detective division. Under these circumstances, the evidence that a

Cranston officer answered Munson's call and innocently referred solely to the investigation of the breaking and entering incident falls far short of the substantiality required to meet the state's burden.

The state, in its brief on this appeal, suggests a third possibility—that the record permits an inference that other Cranston personnel were present, perhaps some who had been working on the earlier shift, which apparently ended at 7 p.m., or a third Cranston detective working on an entirely different murder investigation. There are several problems with these speculations. First, the critical time was about 8:15 p.m., over an hour after the change of shifts. Second, there is no positive testimony that any unidentified personnel were present in what appears from the evidence as an open central room with several telephones. Third, the state's sole line of argument before the Superior Court was not that some person other than the officers known to have been involved with Burbine answered Munson's call, but that there was no such call. Fourth, and most important, is the fact that even if the speculation about additional, unnoticed personnel being present were accepted as proven (despite the "heavy burden" borne by the state), there simply was not an acceptable justification for the answer given Attorney Munson. If such a person, knowing of the attorney's desire to be present at any lineup or questioning, had indeed responded, without hesitation and without checking with others, that the police were through with Burbine for the evening, his response would at the very least have been inexcusably reckless.

We have tried to be both punctilious and fair in our analysis of the circumstances of Attorney Munson's call

and its reception by the Cranston Detectives Division, because close cases may be decided by only a few critical facts. *Fuentes* was a close case, narrowly favoring the state. The case at bar, we feel, crosses the line.

In so holding, and thus disagreeing with both the district court and a respected state court, we join ranks with a number of other respected courts, indeed apparently all the other state supreme courts that have considered the issue. In all of those cases, like the one at bar, *Miranda* warnings were duly given, damaging admissions were made, and there was no hint of threats or physical coercion. And in all of those cases the courts held that the failure to inform a suspect in custody that his attorney or an attorney retained for him was seeking to see him vitiated his waiver of his Fifth Amendment right to assistance of counsel at his questioning.

Through all the cases runs a pattern of evasion or dissimulation similar to the facts in this case. *State v. Haynes,* 288 Or. at 62, 602 P.2d at 273 (evasive answer given attorney: "[W]e know nothing about it."); *Weber v. State,* 457 A.2d 674, 684-86 (Del. 1983) (counsel and suspect's father waited at police station almost four hours; police interrogated suspect without communicating information about counsel; held, plain error); *Commonwealth v. Sherman,* 389 Mass. 287, 450 N.E.2d 566, 567 (1983) (request from attorney to be present at questioning not communicated to suspect even though his interrogation took place soon thereafter); *Commonwealth v. McKenna,* 355 Mass. 313, 324, 244 N.E.2d 560, 566 (1969) (police failed to tell suspect that attorney wanted to be with him during questioning); *People v. Smith,* 93 Ill.2d 179, 183,

189, 442 N.E. 2d 1325, 1326-27, 1330 (1982) (police lied to attorney, saying suspect was undergoing heroin withdrawal; although police did give suspect attorney's card, court held that mere receipt of card could have led suspect to feel attorney was "too busy" to consult); *Commonwealth v. Hilliard,* 471 Pa. 318, 321, 370 A.2d 322, 323 (1977) (police denied having custody of suspect); *State v. Jackson,* 303 So.2d 734, 735-36 (La. 1974) (officials interrogated accused without informing her that retained counsel had called asking that she not be questioned until he conferred with her).

The variations revealed by this catalogue of authorities illustrate the constitutional policy served by these decisions and amply support our limited ruling. Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than just one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary. Were this not so, the proper role of a defense counsel would be meanly diminished. If police officers with a more than warm suspect in their custody were permitted to engage in frustrating dissimulation with impunity, they would have to be more than human to resist the temptation to mislead the suspect and his counsel.

We stress that our ruling is limited. We do not subscribe to the New York rule, based on that state's constitution, that a suspect may never waive his privilege

against self-incrimination in the absence of his attorney. *People v. Hobson,* 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976). We also acknowledge that "a person in custody may . . . speak if he so chooses, and without a lawyer's advice. The crucial point is that it must be a knowing choice as well as voluntary in the sense of not being coerced." *State v. Haynes,* 288 Or. at 72, 602 P.2d at 278. We would note in addition that our holding is restricted to an attorney having at least as much continuing relationship to the client and his family as we found in *Fuentes* and find in this case. Accordingly, we do not foresee any real danger of an influx of volunteering attorneys with no past or present relationship to the client. And, finally, our holding is restricted to a situation where the failure to communicate by the police can only be characterized at the minimum as reckless. What would be the result of a merely negligent failure to communicate we leave for another day. *Compare Weber v. State,* 457 A.2d at 686 (negligent failure to inform suspect is sufficient to vitiate waiver); *Commonwealth v. Hilliard,* 417 Pa. at 323, 370 A.2d at 324 (violation would occur even if suspect was denied counsel as result of "honest mistake" by police).

In conclusion, we find that Burbine's Fifth Amendment right to counsel and privilege against self-incrimination were violated and that all three of the inculpatory statements that he made while in custody should have been suppressed.[5] No one has argued that admission of these statements did not affect the outcome of his case.

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5. So finding, we do not reach petitioner's Sixth and Fourteenth Amendment claims.

Although the jury heard other evidence, there can be little doubt that these statements were critical in obtaining Burbine's conviction. Accordingly, a new trial is required.

The judgment of the district court is reversed. A writ of habeas corpus is to be issued and petitioner released within 60 days of our mandate unless the state of Rhode Island has vacated the judgment of conviction and scheduled an early retrial.

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Boston, Mass.

APPENDIX B

Brian K. BURBINE, Petitioner,

v.

John MORAN, Director, Department of Corrections, Respondent.

Civ. A. No. 83-0293 S.

United States District Court, D. Rhode Island.

June 7, 1984.

An application for writ of habeas corpus was filed. The District Court, Selya, J., held that: (1) defendant's right to counsel was not violated; (2) defendant's *Miranda* rights were not violated; and (3) conduct of policemen in connection with extraction of successive confessions was not so dissonant as to deny defendant due process.

Application denied and dismissed.

1. Habeas Corpus 85.1(2)

Obligation of federal court in habeas corpus proceeding is to accord presumption of correctness to state court findings of fact.

2. Criminal Law 641.3(3)

Defendant did not have right under Sixth Amendment to counsel during questioning by police before initiation of adversary judicial proceedings. U.S.C.A. Const. Amend. 6.

3. Criminal Law 412.2(5)

Totality of the circumstances are to be considered in determining whether defendant knowingly and voluntarily waived rights delineated in *Miranda*.

4. Criminal Law 414

While right to presence of counsel at interrogation by police can be relinquished, heavy burden rests on government to demonstrate that defendant knowingly and intelligently waived privilege against self-incrimination and right to retain appointed counsel. U.S.C.A. Const. Amend. 5.

5. Habeas Corpus 90

In calibrating scales to weigh whether state has shouldered its burden in determining whether defendant knowingly and intelligently waived privilege against self-incrimination and right to retain appointed counsel, substantial deference might be paid in habeas corpus proceeding to state court's findings of historical fact. U.S.C.A. Const. Amend. 5.

6. Criminal Law 412.2(5)

Defendant's *Miranda* rights were not violated where, from and after defendant's first contact with police, course of his conduct evidenced firm, abiding, calculated, and continuing intention to waive right against self-incrimination and right to counsel. U.S.C.A. Const.Amend. 5.

7. Criminal Law 1169.12

Failure of police to inform defendant that attorney from public defender's office had called was harmless

where as late as beginning of third confession, defendant told police that he did not want services of counsel. U.S. C.A. Const. Amend. 5.

8. Criminal Law 412.2(5)

Trickery can annul a superficially valid surrender of Fifth Amendment rights. U.S.C.A. Const. Amend. 5.

9. Constitutional Law 266.1

Conduct of police in connection with extraction of successive confessions did not deny defendant due process of law. U.S.C.A. Const.Amend. 14.

William F. Reilly, Public Defender, Paula Rosin, Asst. Public Defender, Appellate Div., Providence, R.I., for petitioner.

Dennis J. Roberts II, Atty. Gen., Joel D. Landry, Asst. Atty. Gen., Anthony F. DelBonis, Sp. Atty. Gen., Providence, R.I., for respondent.

OPINION AND ORDER

SELYA, District Judge.

This is an application for a writ of habeas corpus brought pursuant to 28 U.S.C. §§ 2241 and 2254. The petitioner, Brian K. Burbine, is currently incarcerated at a state penitentiary. The defendant is the director of Rhode Island's department of corrections.

This proceeding had its origins in the brutal and senseless slaying of a young woman, Mary Jo Hickey, in Providence, Rhode Island, in March of 1977. Burbine was indicted for the crime, tried before a state superior

court jury in early 1979, and found guilty of murder in the first degree.[1] He was sentenced to life imprisonment. His appeal to the state supreme court was initially rejected by an equally divided court. *State v. Burbine,* 430 A.2d 438 (R.I. 1981) (*Burbine I*). A petition for reargument was granted, however, some six weeks later. At full strength for the second go-round, a sharply splintered state supreme court again affirmed the conviction. *State v. Burbine,* 451 A.2d 22 (R.I. 1982) (*Burbine II*) The instant application, filed in this court on April 28, 1983, ensued in due course.

After issue had been joined, the petitioner moved to consolidate his application for hearing with the then-pending petition of Samuel Fuentes, No. 82-0071S (despite the fact that Fuentes had been convicted in a separate trial on charges arising from entirely unrelated offenses). Burbine's motion postulated "that both petitions raise precisely the same legal issues." Fuentes and Burbine, it should be noted, shared common counsel.

This court, in August of 1983, denied Burbine's motion to consolidate, without opinion. Shortly thereafter, the Fuentes application was argued here and was dismissed. *Fuentes v. Moran,* 572 F.Supp. 1461 (D.R.I. 1983)

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1. The trial began on February 21, 1979 and ended on March 2, 1979. The trial transcript (TT) comprises two volumes. Pre-trial motions, including the all-important suppression hearing, were aired from February 15 through February 20 of the same year. Those proceedings are contained in a separate transcript volume (MT), except for Judge Orton's *ora sponte* bench decision denying the motion to suppress, reported at TT 1-7. This court has reviewed the entire trial record, and notes that the evidence of Burbine's guilt was nothing short of overwhelming.

(*Fuentes I*). Fuentes, nothing daunted, appealed the adverse decision.

The court then conferred with counsel in the instant case on October 21, 1983 (the merits having been fully briefed prior thereto). By agreement, proceedings in this cause were held in abeyance (although no formal stay was entered) pending the decision of the court of appeals in respect to Fuentes' appeal. In May of 1984, the First Circuit issued its opinion affirming *Fuentes I*. *Fuentes v. Moran,* 733 F.2d 176 (1st Cir.1984) (*Fuentes II*). This court promply ordered the filing of supplemental briefs "addressing this case in the albedo of *Fuentes* [*II*]." Following the submission of these briefs, oral arguments were heard on May 31, 1984. Decision was reserved.

I. *Factual Background*

[1] The facts germane to Burbine's applications are fully and fairly set out in Justice Weisberger's majority opinion in *Burbine II,* and it would be pleonastic to repeat them in an exegetic fashion here. It suffices merely to highlight the most pertinent data, paying heed withal to the obligation of a federal court in a proceeding of this genre "to accord a presumption of correctness to state-court findings of fact." *Sumner v. Mata,* 455 U.S. 591, 592, 102 S.Ct. 1303, 1304, 71 L.Ed.2d 480 (1982).

The key sequence of events implicated by the instant petition occurred some three months after Hickey's death, when Cranston, Rhode Island police arrected three men, Burbine included, in connection with a break-in. The trio of suspects were brought to the Cranston police station subsequent to 3:00 p.m. on June 29, 1977. One of the

Cranston detectives, Ferranti, was then in possession of a lead in respect to Hickey's death, received from a police tipster. After Burbine's arrest, Ferranti put one and one together, accurately arrived at two, and confronted Burbine vis-a-vis the Hickey affair. He informed Burbine of his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Burbine, at that time, declined to sign a waiver-of-rights form, and Ferranti went no further with him. Ferranti was cognizant, of course, that Hickey's murder had occurred not in Cranston, but in Providence.

While Burbine remained alone in an interrogation room, Ferranti proceeded to question Burbine's putative accomplices on the breaking-and-entering charge. He extended his questioning to the Hickey homicide, and gleaned from them further information which tended to tie Burbine more tightly into that killing. Ferranti, his suspicions bolstered, then called the Providence police. Three Providence officers (Captain Wilson, Lt. Gannon, Detective Trafford) immediately sojourned to Cranston for the express purpose of questioning Burbine about Hickey's murder. They arrived at approximately 7:00 p.m., spoke with Ferranti, and interrogated Sparks (one of the two men who had been arrested with the petitioner). Gannon and Trafford proceeded to quiz Burbine, with Ferranti present.

Before that examination got underway, however, a parallel series of events began to unfold. Burbine, in connection with other pending criminal charges, was then being represented by attorney Richard Casparian, of the state public defender's office. At approximately 7:45 that

evening, Burbine's sister (unbeknownst to him) called the public defender's office seeking to locate Casparian to enlist his aid in connection with Burbine's most recent arrest. She had no inkling at that time that her brother had been implicated in Hickey's demise. Her sole concern was the break-in. Casparian was not about; but the caller reached attorney Barbara Hurst, an appellate specialist in the same office. Hurst, after unsuccessfully trying to reach Casparian, advised attorney Allegra Munson, also an assistant public defender, of Burbine's predicament. By a quarter past 8:00, Munson placed a telephone call to Cranston police headquarters. Justice Weisberger's summary of what next occurred need not be embellished:

> At approximately 8:15 p.m., Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder.

Burbine II, 451 A.2d at 23-24.

Contrary to the information imparted to attorney Munson, the Providence police were continuing to question Burbine about Hickey's demise—although the interrogation by Cranston police as to the break-in which had led to the petitioner's arrest was, for aught that appears, ancient history by that time.[2] Munson's call, of course, did not focus at all on the homicide investigation; she was apparently unaware of it at the moment in question. Munson did not ask to speak with Burbine, nor did she inquire as to why he was in custody (MT. 256). It should likewise be noted that there was absolutely no evidence to indicate that the Providence investigators (or Ferranti, for that matter) were made aware of Munson's call until long after the cat was wholly out of the bag.

It is incontrovertible that, as the evening wore on, Burbine was fully apprised of his *Miranda* rights on at least two occasions, executed a brace of waiver-of-rights forms, signed a confession shortly after 10:00 p.m., and signed a second inculpatory statement an hour later. The next morning, he appeared in state district court in regard to the breaking-and-entering charge; he was thereafter again interrogated by the Providence police, waived his rights once more, and gave a third written statement anent the Hickey affair. Burbine's indictment followed apace.

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2. The trial justice found as a fact that Munson did make this call (TT. 3), but further found that there was no chicanery, collusion or conspiracy on that part of the police "to secrete [Burbine] from his attorney." TT. 3-4. The state supreme court upheld these findings. *Burbine II*, 451 A.2d at 29-30 & n. 5.

At a pre-trial suppression hearing in the state superior court, the petitioner attempted in vain to thwart the prosecution's use at trial of the trilogy of confessions. The trial justice found that Burbine knowingly, intelligently and voluntarily waived his privilege against self-inculpation, and that his right to counsel had not impermissibly been abridged (TT.6-7). The state thereafter profitably employed the three incriminating statements before the jury. And, subsequent to Burbine's conviction and sentencing, the state supreme court held that suppression was not required. *Burbine, II,* 451 A.2d at 31.

II. *Contentions of the Parties*

The applicant makes, at bottom, a trio of contentions. He asseverates that the multiple confessions were euchred from him in violation of (i) his sixth amendment right to counsel, (ii) his fifth amendment right against self-incrimination, and (iii) his fourteenth amendment right to due process. The respondent challenges the applicability of the sixth amendment to these facts (and, in any event, sees no sixth amendment infringement); asserts that the finding of voluntariness is supportable and undercuts the fifth amendment claim; and urges that the petitioner in all material respects received process that was due. Further, the state treats *Fuentes* II as both controlling and dispositive (although conceding at oral argument that the instant proceeding presents a "closer case"); the petitioner, who originally sought to consolidate this case with Fuentes' application on the ground that the two involved identic legal issues, *see* text *ante,* now attempts to distinguish *Fuentes II* in divers ways.

The state does not contest the applicant's claim that the state courts have heretofore had "a meaningful oppor-

tunity to confront the federal constitutional claims," *Sundel v. Justices of the Superior Court,* 570 F.Supp. 1131, 1133 (D.R.I.1983), *aff'd,* 728 F.2d 40 (1st Cir.1984), which are asserted here; and concedes that the petitioner has, therefore, duly exhausted his state remedies as mandated by 28 U.S.C. §§ 2254(b), (c). Perscrutation of the record bears out the Burbine presented each of the theses posited in this proceeding to Rhode Island courts and that he has run the gamut of available state redress. *Rose v. Lundy,* 455 U.S. 509, 515-18, 102 S.Ct. 1198, 1201-03, 71 L.Ed.2d 379 (1982); *Fuentes I,* 572 F.Supp. at 1466.

Thus, the court is free to turn to the substantive arguments advanced by the petitioner (each of which will be addressed seriatim).

III. *The Sixth Amendment*

[2] The sixth amendment to the United States Constitution provides in pertinent part that the accused shall have "the Assistance of Counsel for his defence." In *Fuentes I,* this court held that, in the absence of the prior commencement of formal charge proceedings, "arrest and questioning do not . . . trigger the requirement of counsel under the Sixth Amendment." *Fuentes I,* 572 F.Supp. at 1467. The First Circuit, however, found it unnecessary to resolve whether or not the sixth amendment, generically, was applicable to pre-indictment custodial interrogation, *Fuentes II,* 733 F.2d at 179-80; and Burbine, contending that his case is a far more exacerabated instance than was *Fuentes,* has seized upon the First Circuit's prudential circumvention of the issue as an invitation to pursue the sixth amendment onslaught with renewed vigor.

In the interim, however, the Supreme Court has erased any uncertainty on this point. In *United States v. Gouveia*, — U.S. —, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), the Court held flatly "that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." *Id.* at —, 104 S.Ct. at 2297. Given a fresh holding of the highest tribunal in the land, squarely on point, further comment by this court would be gratuitous. Adherence to the teachings of *Gouveia* demands that Burbine's assault upon his conviction, insofar as that attack utilizes sixth amendment weaponry, must be rejected. *Gouveia*, however, does not foreclose a challenge based on a putative violation of the fifth amendment.

IV. *The Fifth Amendment*

A. *The Legal Standard*

The fifth amendment of the Constitution insists inter alia that no person "shall be compelled in any criminal case to be a witness against himself." Burbine's case, viewed from this perspective, advances a much nicer question.

[3] The generalized origins and nature of the prophylaxy to which an individual subject to custodial interrogation is entitled in order to safeguard his or her right against auto-incrimination has been discussed in considerable detail both by this court in *Fuentes I*, 572 F.Supp. at 1468-71, and by the court of appeals in *Fuentes II*, 733 F.2d at 180-81; and it would serve no useful purpose to parrot that prescription here. It suffies to say that the *per se* rule urged by the petitioner, which would in essence mandate the automatic exclusion of any statements made

by an accused if a lawyer tried to contact the suspect and the fact of such attempted communication was not seasonably called to the person's attention,[3] was expressly eschewed by this court in *Fuentes I*, 572 F.Supp. at 1469-71,[4] and was spurned *sub silentio* by the First Circuit in *Fuentes II*. "(T)here is scant warrant, from a federal constitutional perspective, in imposing such a bright-line demarcation." *Fuentes I*, 572 F.Supp. at 1470. The preferred approach is one which measures the assailed conduct in the totality of the circumstances in order to determine "whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979).

Proper performance of this distillation perforce lends itself to an idiocratic case-by-case approach. After all,

> [T]he relationship of the suspect to the attorney, the extent of the knowledge enjoyed by the authorities, the nature of the lawyer's request, and all kindred factors, become part and parcel of the "totality of the circumstances" which must in all events be sifted and weighed in determining whether or not a free and sentient waiver of the rights to remain silent and to the presence of an attorney has been effectuated.

Fuentes I, 572 F.Supp. at 1470 (citations omitted).

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3. A representative litany of state court cases adopting, and fully explicating, the *per se* rule are collected in *Fuentes I*, 572 F.Supp. at 1469-70. Rhode Island, it should be noted, has declined to ride upon this bandwagon. *E.g., Burbine II*, 451 A.2d at 29-30.

4. To reiterate this court's earlier conclusion, *Fuentes I*, 572 F.Supp. at 1471:

> In sum, this court finds the *per se* rule . . . to be an artificial barrier to law enforcement warranted neither by constitutional precedent nor by common sense.

And, as Chief Judge Campbell observed in *Fuentes II*, 733 F.2d at 181:

> The question of waiver must be decided based on "'the particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused.'" *North Carolina v. Butler*, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 1757-58, 60 L.Ed.2d 286 (1979), (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)).

It follows inexorably that a federal court, sitting in habeas review of a state court conviction, must

> abjure the easy lure of disposing of cases by choosing among a series of neatly-labelled pigeonholes, and turn to the more demanding task of analyzing the full panoply of facts and circumstances which impacted upon the petitioner's actions in the case at bar.

Fuentes I, 572 F.Supp. at 1471.

B. *The Totality of the Circumstances*

[4, 5] There can be no question about Burbine's right to the presence of counsel at and during his interrogation by the police. *Miranda*, 384 U.S. at 469, 86 S.Ct. at 1625; *Fuentes II*, 733 F.2d at 180. While this right can be relinquished, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Id.*, quoting *Miranda*, 384 U.S. at 475, 86 S.Ct. at 1628. *See also United States v. Montgomery*, 714 F.2d 201, 203-04 (1st Cir. 1983). In calibrating the scales so as to weigh whether or not the state has shouldered its burden in this case, substantial deference must be paid to the state court's

findings of historical fact. *Sumner v. Mata*, 455 U.S. at 597, 102 S.Ct. at 1306-07.[5]

Burbine asserts that the conduct exhibited by the police derailed Munson's efforts to assist him and interfered with his fifth amendment right to the attendance of counsel during his questioning. The issue cannot be framed in terms of hampering Munson's endeavors, however; as this court remarked at a comparable juncture in *Fuentes I*:

> The sockdolager is simply this: petitioner's right against self-incrimination is personal; it cannot be invoked or waived by anyone other than the person to whom the right attaches . . . Even if [the police] conduct infringed on an existing attorney-client relationship . . ., it could not violate petitioner's Fifth Amendment right not to incriminate himself unless the conversation itself somehow affected *petitioner's* capacity to invoke his rights.

572 F.Supp. at 1469 (emphasis in original) (citations omitted).

Burbine was not unfamiliar with the ritual of criminal proceedings: not only was he involved, immediately prior to this arrest, with the defense of unrelated criminal charges against him, but he displayed this knowledge in declining Ferranti's initial attempt to secure a waiver-of-rights. There is nothing in the record to suggest that

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5. The finding upholding Burbine's waiver and branding it as voluntary is, of course, on a different footing; this court must make an independent determination on those issues, applying appropriate constitutional precepts to the subsidiary assessments of historical fact espoused by the state judiciary. *Brewer v. Williams*, 430 U.S. 387, 397 n. 4, 97 S.Ct. 1232, 1238-39 n. 4, 51 L.Ed.2d 424 (1977); *Martineau v. Perrin*, 601 F.2d 1196, 1198 (1st Cir. 1979); *Fuentes I*, 572 F.Supp. at 1471.

Burbine was illiterate or lacked the capacity to understand or to appreciate his rights; in point of fact, the trial justice found to the contrary—and this finding is bottomed upon constitutive evidence.

[6] A close reading of the testimony, particularly that of Gannon, reveals that Burbine was advised of the full spectrum of his constitutional prerogatives in a thorough, indeed meticulous, manner (*e.g.*, MT. 24-30, 34-37); that he acknowledged his comprehension of those rights (*e.g.*, MT. 25, 34); and that he specifically agreed to speak with the Providence officers without the presence of counsel. *E.g.*, MT. 27, 63. There is no suggestion here of police brutality, or of coercion, psychological duress, illicit inducement, intimidation, or the like. Burbine was not grilled for long stretches of time, nor in unusually oppressive circumstances. Here, as in *Fuentes*, the "mark of the Inquisition in no way blemishes these proceedings." *Fuentes I*, 572 F.Supp. at 1471.

[7] Moreover, Burbine was at the time being represented by Casparian in connection with another criminal case; indeed, the record shows that he had a scheduled appointment with the attorney on the very day of his apprehension by the Cranston police. Absent the most convenient sort of selective amnesia, he must have been aware that contact with Casparian was among his options as the interrogation began and continued. He did not avail himself of any of his multiple opportunities to do so. The record (*e.g.*, MT. 23) reveals that a telephone was available to him at all times. As late as the beginning of his third confession (shortly after noon on June 30), he told Trafford that he did not want the services of counsel.

E.g., MT. 93, 95. Viewed in this light, the failure of the gendarmie to inform him that Munson had called appears harmless. As Justice Weisberger fittingly observed (*Burbine II*, 451 A.2d at 29):

> The evidence is overwhelming in support of the trial justice's finding that he [Burbine] was admonished of the right to remain silent and of his right to retained or appointed counsel. It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver. Indeed, the additional information seems somewhat inconsequential in the light of defendant's own knowledge as supplemented by the admonitions of the police officers.

[8] Nor can Burbine persuasively argue that the failure of the police to inform him of Munson's call, or the alleged imparting of misleading information to the attorney, severally or collectively constituted chicanery sufficient to vitiate his seriatim waivers. While it is true that trickery can annul a superficially valid surrender of fifth amendment rights, *Miranda*, 384 U.S. at 476, 86 S.Ct. at 1628-29; *Fuentes II*, 733 F.2d at 181, that doctrine is not called into play on these facts. The trial justice specifically cleared the police of any collusion or attempt to deceive; and the state supreme court, *Burbine II*, 451 A.2d at 29-30 n. 5, presented an entirely plausible explanation for the seeming inconsistency in the trial court's findings (the superior court having coupled its exoneration of the police officers with a finding that Munson had indeed called). More importantly, Burbine had an ongoing professional relationship with the public defender's office; and, therefore, knew not only of his right to the assistance

of counsel but of his entree to the public defender should he wish assistance from that source. The parallel to Fuentes' case is unmistakable. *See, e.g., Fuentes II,* 733 F.2d at 181. To borrow Chief Judge Campbell's phrase, the police "were hardly withholding vital information" in failing to mention Munson's call to the applicant.[6] *Id. See also Hance v. Zant,* 696 F.2d 940, 947 (11th Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983); *United States v. Brown,* 569 F.2d 236, 239 (5th Cir. 1978) (en banc).

Finally, it should be noted that the petitioner waived his rights not on one isolated occasion, but three times within less than a day (on the last instance, after having been brought before a judicial officer). And, the second statement came about at Burbine's instigation, when he volunteered that he had forgotten to mention something of consequence in his first confession. MT. 33. At no time, apart from his declination of Ferranti's original invitation to talk,[7] did he essay to halt the questioning or to stand upon his right to remain silent—and the record reflects that he was specifically advised of his right to draw the line at any given point.[8] The record persuasively in-

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6. There was, of course, absolutely no evidence that any of the officers who participated in the investigation knew of Munson's inquiry; nor did the trial justice impute any such knowledge to them.

7. Even this demurrer was less than complete; Burbine did give Ferranti some helpful information anent his sobriquet and place of residence. *See, e.g., Burbine II,* 451 A.2d at 23.

8. In Lt. Gannon's words: "I made it clear to him that at anytime he wanted to, he could terminate the statement, and at anytime he felt he wanted to call a lawyer, once again, that he should terminate the statement and obtain a lawyer." MT. 29.

dicates that the Providence police were both painstaking and assiduous in their attention to the *Miranda* commandments. From and after Burbine's first contact with the Providence police, the course of his conduct "evidenced a firm, abiding, calculated, and continuing intention to waive his right against self-incrimination and his right to counsel." *Fuentes I*, 572 F.Supp. at 1473. He had several meaningful opportunities to maintain his silence, but he forebore. And, there is scant reason to believe that news of Munson's inquiry, even if revealed, would have constituted a consequential datum or would have deflected Burbine from his self-appointed rounds.

Burbine's case is, indeed, a more compelling one than Fuentes', on almost every score. His educational background and attainment appeared considerably less imposing, his experience with the criminal justice system, while appreciable, was not so wide and varied, his behavior from and after the time of apprehension was a trifle less decisive, and the actions of the constabulary can be viewed as having sailed a little closer to the wind. Yet, the signal, while perhaps amber, does not glow red. Given the circumstances of the case as a whole, the state court's finding that the prosecution successfully sustained the weighty burden of establishing that petitioner's waiver was made sentiently, intelligently, and in the free exercise of volitional judgment is supportable. *See Fuentes, II*, 733 F.2d at 180-81.

V. *The Fourteenth Amendment*

[9] Like Fuentes before him, Burbine orchestrates a due process sirvente: his reprise is that the conduct of the police in connection with the extraction of the succes-

sive confessions was so dissonant as to deny him due process of law. But, his song is out of tune. This court held in *Fuentes I* that where "the official behavior [in question] stands squarely on the parade ground of the Fifth and Sixth Amendments; and it has passed muster under those amendments," there is no "justification for the courts to attempt to enlarge *Miranda* by subsuming Fifth and Sixth Amendment rights in a catch-all Fourteenth Amendment sweep." 572 F.Supp. at 1474. This court explained:

> If the police grant to the suspect the rights limned in *Miranda* and in *Kirby* [*Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)], according to the tenor of the rule, then the suspect has been treated with all the equity required of the criminal justice system in that regard; and the slippery slope of fundamental fairness need not—and should not—be independently addressed in terms of the self-same subject matter.

Id.[9]

Though the court of appeals found it unnecessary to paint with so broad a brush on this issue, *Fuentes II*, 733 F.2d at 181 ("Even assuming, which we do not decide, that the fourteenth amendment provides protection in this case greater than that offered by the fifth and sixth amendments . . ."), Chief Judge Campbell went on to hold

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9. *Kirby*, a plurality opinion of the Court, was the spiritual and intellectual forerunner of *Gouveia*. (406 U.S. at 689-90, 92 S.Ct. at 1882-83). While the force of *Kirby* may have been in some doubt during the decade following its announcement, and at the time the First Circuit ruled in *Fuentes II*, *Gouveia* has now entirely dissipated any such dubiety and has legitimized the primary tenets of *Kirby*. *See United States v. Gouveia*, — U.S. at —, 104 S.Ct. at 2297.

that no impermissible intrusion upon fundamental fairness had transpired. *Id.*

In the case at bar, this court continues to hew to the line drawn in *Fuentes I*, 572 F.Supp. at 1474. And, even if some more expansive prophylaxsis can be read into the due process clause, the doings in this case do not "'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" *Fuentes II*, 733 F.2d at 181, quoting *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1952), (quoting *Malinski v. New York*, 324 U.S. 401, 416-17, 65 S.Ct. 781, 788-89, 89 L.Ed. 1029 (1945) (Frankfurter, J., concurring)). This court's remarks in *Fuentes I* seem equally appropriate here:

> Regardless of the desirability of the police conduct at bar, the petitioner could have insulated himself by invoking the protections of *Miranda*. The warnings accorded to him were full and fair, and his opportunities to claim the privilege were manifold. His failure to do so cannot now redound to affect the efforts of the police. His neglect was his own; and that neglect cannot and should not be palmed off as violating a penumbrous Fourteenth Amendment (irrespective of what may seem to be less than complete professionalism on the part of the police). An application for habeas relief does not pivot on whether a district judge approves or disapproves of police methodology; the only issue, at bottom, is whether the legitimate constitutional rights of the petitioner have been abrogated in some meaningful way. No such abrogation occurred here.

Fuentes I, 572 F.Supp. at 1474-75 (footnote omitted).

VI. *Conclusion*

For the foregoing reasons, the application for writ of habeas corpus is denied and dismissed.

So ordered.

APPENDIX C

STATE

v.

Brian K. BURBINE.

No. 79-212-C.A.

Supreme Court of Rhode Island.

June 5, 1981.

Reargument Granted July 23, 1981.

Appeal from Superior Court, Providence and Bristol Counties; Orton J.

Dennis J. Roberts, II, Atty. Gen., Joel D. Landry, Asst. Atty. Gen., for plaintiff.

William F. Reilly, Public Defender, John A. MacFadyen, III, Chief Appellate Atty., Paula Rosin, Asst. Public Defender, for defendant.

OPINION

PER CURIAM.

The trial justice's denial of the defendant's motion to suppress is affirmed by an equally divided court, the defendant's appeal is denied and dismissed, and the judgment of conviction appealed from is affirmed.

SHEA, J., did not participate in the consideration or the decision of this case.

APPENDIX D

STATE

v.

Brian BURBINE.

No. 79-212-C.A.

Supreme Court of Rhode Island.

Sept. 9, 1982.

Reargument Denied Dec. 16, 1982.

Defendant was convicted in the Superior Court, Providence and Bristol Counties, Orton, J., of first-degree murder, and he appealed. On reargument after issuing initial opinion, 430 A.2d 438, the Supreme Court, Weisberger, J., held that: (1) police were not required to inform defendant of telephone call from public defender regarding defendant's representation in order that his written and verbal waivers of his right to remain silent and right to counsel might be knowing and intelligent, and (2) finding of trial justice that defendant's confessions were voluntary and made following intelligent waiver of right to counsel and right to remain silent was supported by ample evidence.

Affirmed.

Murray, J., concurred and filed opinion.

Bevilacqua, C.J., dissented and filed opinion joined in by Kelleher, J., who also filed dissenting opinion.

1. Criminal Law 412.2 (3)

In order to trigger necessity for *Miranda* admonitions, dual elements of custody plus interrogation must

exist. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result).

2. Criminal Law 412.2 (3)

Principles of *Miranda* place assertion of right to remain silent and right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result). U.S.C.A.Const. Amends. 5, 6.

3. Criminal Law 412.2 (5)

Police officers, who received telephone call from public defender informing them that defendant was represented by another attorney in public defender's office who was not available and informing them that she would act as defendant's legal counsel in event that police intended to place him in a lineup or question him, were not required to inform defendant of the telephone call in order that his written and verbal waivers of his right to remain silent and right to counsel might be knowing and intelligent. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result). U.S.C.A.Const. Amends. 5, 6.

4. Criminal Law 1158 (4)

Trial judge's finding that defendant's confessions were voluntary and made following intelligent waiver of right to counsel and right to remain silent was supported by ample evidence and was not clearly wrong. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result). U.S.C.A.Const.Amends. 5, 6.

Dennis J. Roberts II, Atty. Gen., Joel D. Landry, Asst. Atty. Gen., for plaintiff.

William F. Reilly, Public Defender, Paula Rosin, Asst. Public Defender, for defendant.

OPINION

WEISBERGER, Justice.

This case comes before us on appeal from a judgment of the Superior Court finding the defendant, Brian Burbine (Burbine), guilty of murder in the first degree and imposing a life sentence as required by statute. Prior to trial, Burbine sought to suppress three incriminating statements obtained from him by officers of the Providence police department. The sole thrust of this appeal relates to the denial of the motion to suppress.

On March 3, 1977, at about 7 a.m., Mary Jo Hickey (Mary) was found unconscious in a parking lot on Elmwood Avenue in Providence. She was taken to St. Joseph Hospital where she remained for a time and was then transferred to the Rhode Island Medical Center. She was treated there until March 25, 1977, when she died from injuries to the skull and brain resulting from bludgeon wounds inflicted by a large metal pipe which had been found near the scene of the attack.

The state called two witnesses, who testified that Burdine left Rhode Island and went to their house in Maine on March 4, 1977. Nancy Jean Sanders James (Nancy) stated that Burbine stayed with her and her brother, Donald Sparks (Sparks), for approximately one month. While he was in Maine, Burbine told Nancy that he had met Mary at a downtown Providence bar on the evening of

March 2. Mary had bought him some drinks and then asked for a ride to her home. Burbine further stated that on the way to her house, he pulled into a parking lot and made advances to Mary. When the advances were resisted, Burbine slapped Mary "a time or two" and threw her out of the car. "[T]hat's all he knew." He stated that this had all happened "just before he came to Maine." Burbine told substantially the same story to Sparks, except that he stated to Sparks that Mary had blood on her as a result of his striking her. Burbine also informed Sparks that the next morning he had washed the blood from the interior of his automobile.

On June 29, 1977, the Cranston police arrested three men in connection with a charge of breaking and entering. One of the trio was Burbine; the other two were Sparks and a man named DiOrio. All three suspects were transported to the Cranston police headquarters. Detective Ferranti of the Cranston police two days earlier had received information from a confidential informant that a man named "Butch" who lived at 306 New York Avenue in Providence was responsible for the killing of Mary. He noted that Burbine and DiOrio had given 306 New York Avenue as their home address. Ferranti questioned DiOrio, who stated that Burbine was the only person living at that address who was called "Butch."

Armed with this information, Detective Ferranti informed Burbine of his *Miranda* rights, and at that time Burbine would not sign the waiver-of-rights forms. However, Burbine did respond that he was the only person called "Butch" who recided at 306 New York Avenue. Ferranti left Burbine in the interrogation room and spoke with DiOrio and Sparks. Both men made statements im-

plicating Burbine in the Providence homicide. Thereupon, Ferranti contacted Captain Milton Wilson of the Providence police department at about 6 p.m. Captain Wilson, along with Lieutenant Bernard Gannon and Detective Edward Trafford, proceeded tc the Cranston police station for the purpose of questioning Burbine in regard to the killing of Mary. They arrived at approximately 7 p.m. and went to the Cranston detective division where they spoke with Detective Ferranti and then questioned Sparks and DiOrio.

At about 7:45 p.m., Burbine's sister, Sheila Ray, called the office of the public defender (without her brother's knowledge) to seek assistance for her brother who had previously been represented by Richard Casparian of the Public Defender's office in respect to another matter not related to the instant reasons for police custody. In fact, Burbine had missed an appointment with Mr. Casparian the afternoon of his arrest. Barbara Hurst, an appellate attorney, received the call and attempted to contact Mr. Casparian but was unable to reach him. She then called Allegra Munson, an assistant public defender, and informed Ms. Munson of the telephone conversation with Sheila Ray.

At approximately 8:15 p. m., Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him.

The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder. The trial justice found as a fact that Ms. Munson did make the call, but further found that there was no collusion or conspiracy on the part of the police "to secrete [Burbine] from his attorney * * *."

Lieutenant Gannon testified that he explained the *Miranda* rights to Burbine and that Burbine waived the rights by signing a waiver-of-rights form. Thereafter, a signed confession was obtained from Burbine at approximately 10:20 p. m. on June 29. A second statement was taken at the police station at approximately 11:20 p. m. A waiver-of-rights form was executed in connection with the second statement. The Providence police obtained a third written statement from Burbine during the noon period of the following day following Burbine's presentation to the District Court on the breaking-and-entering charge.[1]

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1. When presented to the District Court, defendant purported to plead guilty to a reduced charge of malicious damage to property. He was then sentenced to six months imprisonment to commence upon his release from the custody of the Providence police. Thereafter, the public defender moved to vacate this sentence as constitutionally infirm under standards laid down in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), since Burbine was unrepresented by counsel. However, the sentence was appealed to the Superior Court before the motion to vacate was addressed in the District Court. On June 24, 1979, Burbine pleaded nolo to the charge in the Superior Court, with representation by legal counsel, and was sentenced to six months imprisonment concurrent with a previous sentence imposed.

All five officers who were involved in Burbine's interrogation at the Cranston police station denied any knowledge of Ms. Munson's call. There was no evidence or finding that the Providence police detectives were aware of Ms. Munson's call.

After the third confession had been obtained, at the request of Detective Trafford, Major Leyden of the Providence police department called the Public Defender's office in order to obtain an attorney to represent Burbine in respect to a lineup. Thomas Luongo, Jr., an investigator in the office of the public defender, received the call and conveyed the information to attorney Casparian who went to the Providence police station and consulted with Burbine.

At the hearing on the motion to suppress, the trial justice found that Burbine had been thoroughly advised of his right to remain silent, that anything he said would be used against him, and of his right to retained or appointed counsel. He further found that Burbine was not coerced, threatened, nor promised any benefit in return for his statements. The trial justice concluded that Burbine signed waiver-of-rights-forms on three separate occasions and that when he did so "he knowingly, intelligently, and voluntarily waived his privilege against self-incrimination. And also his right to counsel."

The defendant contends that all three confessions should have been suppressed on the ground that they were obtained in violation of defendant's right to counsel and his privilege against self incrimination. In order to place the issues raised into sharper focus, a short historical survey of the development of the modern doctrines relating to custodial interrogation will be helpful.

During the first five decades of the twentieth century, the Supreme Court of the United States groped toward a means of striking a balance between societal need for police interrogation and the protection of the accused from undue coercive pressures. By virtue of the differing constitutional and supervisory responsibilities of the Court in respect to the federal as opposed to state judicial systems, a dual and separate approach was adopted.

In respect to the federal system of law enforcement, the Court utilized a federal statute and later federal rules of criminal procedure in order to shorten the interrogation. *See Mallory v. United States,* 354 U.S. 449, 452, 77 S.Ct. 1356, 1358, 1 L.Ed.2d 1479, 1482 (1957); *McNabb v. United States,* 318 U.S. 332, 343-44, 63 S.Ct. 608, 614-15, 87 L.Ed. 2d 819, 825-26 (1943). It was thought by Justice Frankfurter and his colleagues that the shortening of interrogation and the requirement that a suspect be presented to a federal magistrate without "unnecessary delay" would reduce the evils of a secret interrogation process at police headquarters. It was further urged that the magistrate would warn the suspect of his right to remain silent and his right to counsel. The *McNabb-Mallory* rule did not purport to be a rule of constitutional dimension but was based upon the Court's supervisory power over the administration of federal criminal justice as well as in implementation of a federal statute in *McNabb* and, in the *Mallory* case, Rule 5(a) of the Federal Rules of Criminal Procedure. The Court did not purport to extend this rule of stringently shortened interrogation to the states.

Indeed, at that time the Court's review of state cases involving allegedly involuntarily confessions was based

upon a due-process "shock the conscience" test.[2] The first case which resulted in the setting aside of a state conviction wherein a coerced confession had been obtained was *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). In that case the Court found that overt brutality and torture had produced the confession. This shocked the conscience of the Court sufficiently so that the confession was held inadmissible. Other cases met with varied responses. In *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958), a suspect in a murder case was repeatedly interrogated during a period of approximately fourteen hours. His request for an attorney was denied. The suspect was a college graduate who had completed one year in law school. These circumstances were not sufficient to shock the conscience of the Court and it was held that due process had not been violated. In *Cicenia v. LaGay*, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958), a murder suspect requested to be allowed to see his attorney while under questioning by the police. The attorney arrived at the police station while petitioner was being interrogated and was refused admittance. This suspect did not have the benefit of a college education or law school experience. Nevertheless, he failed to achieve the threshold requirement necessary to constitute a violation of due process and his conviction was upheld. In *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959), the Court's conscience was shocked by the misleading of the suspect by a childhood friend who had become

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2. The "shock the conscience" test was also utilized in state search and seizure cases prior to the adoption of the exclusionary rule. *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183, 190 (1952).

a policeman. The erstwhile friend suggested that his job might depend upon getting a statement from the defendant. The giving of the statement contributed to the conviction and imposition of a death sentence. In that case due process was held to have been violated. The Court's sensitivity to the shocking of conscience had become heightened by the time it considered *Rogers v. Richmond,* 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), and slight pressure exerted by the chief of police who threatened to take the suspect's arthritic wife into custody if the suspect did not confess was held to be sufficient to invalidate the confession. The Court also used this case to point out that an involuntary confession was inadmissible, not because it was unlikely to be true, but because the methods used offended an underlying principle of enforcement of the criminal law—that the authorities might not by coercion prove a charge out of the accused's own mouth. The culmination of the due-process test came with *Haynes v. Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) in which an examination of the totality of circumstances convinced the Court that a written confession had been obtained in an atmosphere of substantial coercion by state authorities.

The following year the Court decided *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) in which it selectively incorporated the privilege against self-incrimination contained in the Fifth Amendment into the due-process clause of the Fourteenth Amendment. Thus, for the first time, the privilege against self-incrimination became applicable to the states. Initially this holding did not herald any remodification of the interrogation process, since conventional wisdom at the time did not apply the privilege against self-incrimination to the police in-

terrogation process, because the police had no legal power to compel testimony. *See* Y. Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, in Police Interrogation and Confessions 48-55 (1980).

During the same year, a feeble effort was made to control the voluntariness of confessions by the somewhat fortuitous event of a lawyer's having been previously retained in respect to the specific criminal case under examination, and under circumstances where a lawyer and client were kept apart by a series of blatant deceptions.[3] *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964). Moreover, in that case no admonitions had been given to the accused concerning his right to remain silent or his right to assistance of counsel. Indeed, so many of the facts in *Escobedo* would have been unlikely of repetition that the precedential value of the case was extremely limited and subject to many conflicting interpretations in the various states. *See, e.g., State v. Mendes,* 99 R.I. 606, 210 A.2d 50 (1965); *States v. Dufour,* 99 R.I. 120, 206 A.2d 82 (1965); *People v. Dorado,* 62 Cal.2d 338, 398 P.2d 361, 42 Cal.Rptr. 169, *cert. denied,* 381 U.S. 937, 85 S.Ct. 1765, 14 L.Ed.2d 702 (1965); *People v. Hartgraves,* 31 Ill.2d 375, 202 N.E.2d 33 (1964), *cert. denied,* 380 U.S. 961, 85 S.Ct. 1104, 14 L.Ed.2d 152 (1965); *Mefford v. State,* 235

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3. It is interesting to observe that the deceptive practices of *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 997 (1964), were practically identical to the practices which were held not to constitute a violation of due process in *Cicenia v. LaGay,* 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958). This simply was a manifestation of the difference between the "shock the conscience" test and the application of a different evaluation under the specific guarantee of the Sixth Amendment right to counsel.

Md. 497, 201 A.2d 824 (1964), *cert. denied,* 380 U.S. 937, 85 S.Ct. 944, 13 L.Ed.2d 825 (1965); *State v. Scanlon,* 84 N.J.Super.427, 202 A.2d 448 (1964).

Upon this somewhat murky judicial environment, the Court's opinion in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), came as a brilliant flash of lightning illuminating the interrogational landscape in all directions, but followed by the thunderclap of criticism concerning its effects upon law enforcement. In itself, the *Miranda* decision was relatively simple and its mandate not unduly difficult in application. Essentially stripped of historical analysis and carefully developed rationale, the Supreme Court imposed a set of rules upon every police officer in the land who might seek to interrogate a person suspected of crime who had been taken into custody or whose freedom had been inhibited in a significant way. The rule required that the following admonitions be given to the suspect: (1) that he has a right to remain silent; (2) that anything which he might say can be used against him in a court of law; (3) that he has the right to the presence of an attorney; (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. The Court went on to say:

> "After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

Id at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

This rather straightforward movement of the privilege against self-incrimination from the courtroom into the police station was greeted by intense criticism, perhaps some of it most forcefully presented by the dissenting justices. A sample of such criticism may be taken from Justice White's dissenting opinion.

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: The next victims are uncertain, unnamed and unrepresented in this case." (White, J., dissenting). 384 U.S. at 542-43, 86 S.Ct. at 1663, 16 L.Ed.2d at 763.

[1] We note that the *Miranda* rules have been extended and clarified in more recent opinions, and their relationship to the right to counsel has been expanded and defined. *See, e.g., Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); *Beckwith v. United States,* 425 U.S.

341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976); *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969); *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968). The teaching of *Miranda* and its progeny discloses certain basic principles to which the Court has adhered rather consistently. First, in order to trigger the necessity for *Miranda* admonitions, the dual elements of custody plus interrogation must exist. Custody or impairment of freedom in a significant way may take place in defendant's home (*Orozco*), or in a jail not controlled by the interrogator (*Mathis*). Absent custody or impairment of freedom, focus of suspicion which was so important in *Escobedo* is no longer of significance. (*Mathiason* and *Beckwith*). No importance has been attached to the fortuitous circumstances of representation by counsel save in such cases as *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and *Brewer v. Williams, supra*, where, after the commencement of judicial proceedings and the appointment or retention of counsel, it becomes impermissable for the police to take any action either surreptitious or overt which is designed or might reasonably be expected to elicit an inculpatory response. *See also Rhode Island v. Innis, supra* (although judicial proceedings had not commenced, counsel had been requested. Consequently a *Miranda* rather than the *Massiah-Brewer* analysis was applied).

[2] It seems reasonably apparent that in *Miranda* the Court placed the burden of admonition squarely upon the police. The Court further required law-enforcement officials to respect without equivocation a suspect's request for counsel or assertion of the right to remain silent.

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice-in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

" • • •

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. at 473-75, 86 S.Ct. at 1627-28, 16 L.Ed.2d at 723-24.

Nothing in the *Miranda* opinion or in succeeding cases has indicated that the right to counsel may be asserted by any-

one other than the accused. The strength of *Miranda* lies in its simplicity. It was designed as a set of sharp bright-line directions which police officers could easily follow. It was not dependent on the kind of fortuitous circumstance exhibited in *Escobedo,* whose very limited application it transcends and supersedes. Even such a robust exponent of the rights of the accused as Professor Yale Kamisar points out the weak congruence between a defense lawyer's entry into the proceedings and the suspect's need for a lawyer's help:

> "Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'spring[s] to the telephone' hardly seems a rational way of reconciling the interests of the accused with those of society." Y. Kamisar, Brewer v. Williams, Massiah, and Miranda: *What is "interrogation"? When Does it Matter?* in Police Interrogation and Confessions 220 (1980).

Consequently, we are of the opinion that the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys.

In essence, defendant urges us to adopt a New York rule originated in *People v. Donovan,* 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), and further explicated in *People v. Arthur,* 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), and *People v. Hobson,* 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), sometimes

referred to as the *Donovan-Arthur-Hobson* rule.[4] This rather sweeping rule states that:

> "Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel." [Citation omitted.] *People v. Arthur*, 22 N.Y.2d at 329, 289 N.E.2d at 539, 292 N.Y.S.2d at 666.

The New York rule as interpreted in *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965) has been given such effect as to bar the use of an inculpatory statement made by a suspect in California after the defense lawyer telephoned the Nassau County chief of police in New York that he was representing the defendant. The principle to be derived from the New York cases is that once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches and may not be waived in the absence of counsel. This rule extended the constitutional protections of a defendant under the New York Constitution beyond those afforded by the Federal Constitution as asserted by Chief Justice Breitel in *People v. Hobson*, 39 N.Y.2d at

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4. It should be noted that *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.2d 841 (1963) was decided prior to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As was demonstrated in *Vignera v. New York*, one of the *Miranda* group of cases, it was not part of the procedural safeguards of the law of New York at that time to admonish suspects prior to interrogation of the right to remain silent or the right to counsel. *Miranda v. Arizona*, 384 U.S. at 493-94, 86 S.Ct. at 1637-38, 16 L.Ed.2d at 734-35.

483-84, 348 N.E.2d at 897-98, 384 N.Y.S.2d at 422. The rule has been rejected in *Moore v. Wolff,* 495 F.2d 35 (8th Cir. 1974); *United States v. Durham,* 475 F.2d 208 (7th Cir. 1973); *Coughlan v. United States,* 391 F.2d 371 (9th Cir.), *cert. denied,* 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968); *State v. Marks,* 113 Ariz. 71, 546 P.2d 807 (1976); *Ehouse v. State,* 231 Ga. 716, 203 S.E.2d 537 (1974); *State v. Smith,* 294 N.C. 365, 241 S.E.2d 674 (1978). Most persuasively, this view is at odds with the expressed opinion of the Supreme Court of the United States in *Brewer v. Williams, supra,* wherein the Court observed:

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." (Footnote omitted.) 430 U.S. at 405-06, 97 S.Ct. at 1243, 51 L.Ed.2d at 441.

This court has in the past attempted to follow in interrogation cases the mandates of the Supreme Court of the United States as we have understood them to be. *See, e.g., State v. Benton,* R.I., 413 A.2d 104 (1980); *State v. Cline,* R.I., 405 A.2d 1192 (1979); *State v. Innis,* 120 R.I. 641, 391 A.2d 1158 (1978), *vacated,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *State v. LaRosa,* 112 R.I. 571, 313 A.2d 375 (1974).

In considering whether to depart from the standards set forth by the Supreme Court of the United States in order to give further protection under limited circumstances to an accused who has not exercised his right to remain silent or his right to counsel, we must consider the

balance of interests between society's need for reasonable low enforcement as against the accused's right to remain silent and to assert his privilege against self-incrimination. We recognize that other jurisdictions have adopted the New York rule or a variation thereof. *State v. Jackson,* 303 So.2d 734 (La.1974); *Commonwealth v. McKenna,* 355 Mass. 313, 244 N.E.2d 560 (1969); *State v. Haynes,* 288 Or. 59, 602 P.2d 272 (1979); *Commonwealth v. Hillard,* 471 Pa. 318, 370 A.2d 322 (1977); *State v. Jones,* 19 Wash. App. 850, 578 P.2d 71 (1978).

We are not persuaded by those authorities that the New York rule strikes the appropriate balance. In the case at bar, as in *State v. Cline, supra,* no relationship of attorney and client existed between Ms. Munson and defendant. As in *State v. Fuentes,* R.I., 433 A.2d 184 (1981), the fact that another member of the public defender's office had represented defendant on a completely unrelated matter did not create an attorney-client relationship by virtue of Ms. Munson's unsolicited telephone call.

[3] Our dissenting brethren suggest that there was an obligation on the part of the police to inform Burbine of the telephone call in order that his written and verbal waivers of his right to remain silent and the right to counsel might be knowing and intelligent. We cannot accept this suggestion. In the case at bar defendant had previously been represented by the public defender's office. The evidence is overwhelming in support of the trial justice's finding that he was admonished of the right to remain silent and of his right to retained or appointed counsel. It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the

quantum of information necessary for the accused to make an informed decision as to waiver. Indeed, the additional information seems somewhat inconsequential in the light of defendant's own knowledge as supplemented by the admonitions of the police officers. The dissenting justice acknowledge, unlike the Court of Appeals of New York, that after proper warning an arrested person can voluntarily waive the right to remain silent and the right to counsel. Their sole disagreement with the admissibility of the confessions in this case lies in the failure of the Cranston police, whether through negligence or otherwise, to pass on the information concerning Ms. Munson's telephone call.[5]

We fear that if such a rule were adopted, there would be nothing to prevent or discourage the office of the public defender or other defense counsel who represent a

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5. Our brother Kelleher suggests that the trial justice's finding that an assistant public defender did in fact call the Cranston detective division was incongruous with the finding that there was no conspiracy or collusion on the part of the Cranston police department to secrete this defendant from his attorney. He therefore considers the finding to be clearly wrong. In the light of this comment, it should be noted that the principal interrogation of defendant concerning a suspected homicide was conducted by the Providence police and not by the Cranston police. It should further be noted that the Cranston police had finished their interrogation of defendant in respect to a breaking and entering charge for which he had been arrested. Thus, the disparate activities of the representatives of the two police departments could give rise to a reasonable inference that the unidentified member of the Cranston police department who answered the telephone may well have been talking about an entirely different charge than that concerning which the Providence police would later interrogate. Thus, the trial justice's finding was based upon a set of unusual circumstances which did not inevitably point in the direction of conspiracy or collusion.

large number of recidivistic clients from sending to the various police departments throughout the state the names of these clients, together with a request that these attorneys be notified in the event that such individuals are arrested for criminal conduct. Under such a rule, the failure of the police, whether by administrative inadequacy or otherwise, to effectuate such a notification would then be fatal to the admissibility of any statements thereafter obtained. As the crime rate increases and as organized society seems ever more impotent to deal with crime on our streets, in our neighborhoods, and in our homes, this addition to the *Miranda* requirements seems as unwise on policy grounds as it is unnecessary on constitutional grounds. Thus far, the Supreme Court of the United States has placed no such mandate upon us.

Dissenting justices in *State v. Jackson* correctly point out that both *Miranda* and *Escobedo* hold that the failure to honor the *accused's* request to consult with an attorney constituted a denial of the *accused's* right to assistance of counsel under the Sixth and Fourteenth Amendments. *See State v. Jackson,* 303 So.2d at 738 (Saunders, C.J. and Marcus, J., dissenting). To modify this right as did the Supreme Court of Louisiana so that it may be invoked by family members or any other third party who happens to be a member of the bar would badly upset the balance between the societal interests and those of the accused. The next logical step would be to ban confessions altogether on the theory that a person should not be denied his right to counsel on the fortuitous circumstance that someone might not see fit to call the station. We are unwilling to take the first step which would inevitably lead to the ultimate step. We consider that the paramount

function of government is the security of the citizens, victims as well as those who may be accused of crime. It has been recognized that the questioning of suspects is indispensable in law enforcement. *Culombe v. Connecticut,* 367 U.S. 568, 578, 81 S.Ct. 1860, 1865, 6 L.Ed.2d 1037, 1044 (1961). Perhaps the essential purpose served by police interrogation has been most graphically set forth by Justice Jackson in his concurring opinion in *Watts v. Indiana,* 338 U.S. 49, 61-62, 69 S.Ct. 1347, 1359, 93 L.Ed. 1801, 1810 (1949):

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitarary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted.
>
> "I doubt very much if they require us to hold that the State may not take into custody and question one suspected resonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested."

We therefore strike the balance at the point required by *Miranda* and its progeny. We decline to extend it by

adoption of the *Donovan-Arthur-Hobson* rule or a variation thereof.[6]

[4] In the case at bar the finding of the trial justice that the confessions were voluntary and made following intelligent waiver of the right to counsel and the right to remain silent was supported by ample evidence and was certainly not clearly wrong. *See State v. Fuentes, supra; State v. Amado,* R.I., 424 A.2d 1057 (1981); *State v. LaRosa, supra; State v. Leavitt,* 103 R.I. 273, 237 A.2d 309, *cert. denied,* 393 U.S. 881, 89 S.Ct. 185, 21 L.Ed.2d 155 (1968).

For the reasons stated, the appeal of the defendant is denied and dismissed, the judgment of conviction is affirmed, and the papers in the case may be remanded to the Superior Court.

MURRAY, Justice, concurring.

In concurring with the result and the rationale of my associates that no attorney-client relationship existed between the public defender and the defendant, I feel compelled to articulate further the essentials necessary to create the relationship of attorney and client between an

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6. Our brother Kelleher with his usual perceptiveness is quite correct in his observation that the thrust of the *Miranda* decision was the protection of the Fifth Amendment right against self-incrimination. In his eagerness to extend *Miranda,* however, he overlooks the fact that the privilege against self-incrimination has been consistently held to be a personal privilege and must be asserted by the person entitled thereto, and not by others on his behalf. *Fisher v. United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *Bellis v. United States,* 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974); *Couch v. United States,* 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973).

indigent criminal defendant and a member of the Public Defender's office. In so doing, it is important that the function and the role of the Public Defender's office be placed in its historical perspective.

In 1941, the General Assembly created the Office of the Public Defender by the enactment of P.L. 1941, ch. 1007, § 1. In that enactment, section 3 provided that "[i]t shall be the duty of the public defender to represent and act as attorney for indigent defendants * * *." The creation of the Office of the Public Defender thus represented the statutory institutionalization of an earlier system which provided legal assistance to indigent defendants by court appointment of private counsel after the court had made a finding of indigency.

Section 3 of the original legislation creating the office required the Public Defender to represent indigent defendants "in those criminal cases referred to him by the superior courts." This provision, which may now be found as G.L.1956 (1981 Reenactment) § 12-15-8, provides that the Public Defender represent indigent defendants in those criminal cases referred to him by this court, the Superior Court, and the District Court. Other provisions of the General Laws empower the justices of the Family Court to request that the Public Defender represent a parent or a child involved in a delinquency or dependency hearing (G.L. 1956 [1981 Reenactment] § 14-1-31) or to represent a defendant in a criminal proceeding in that court (G.L. 1956 [1981 Reenactment] § 14-1-58).

A reading of each of the above-cited statutory provisions makes it clear that the Public Defender is designated to represent a particular defendant through a referral of

that defendant by a justice of one of the courts enumerated therein. Once referred to the Public Defender, a defendant must submit to the department a sworn financial statement, setting forth his or her current assets and liabilities, sources of income and the names of those persons, if any, able to support him or her or to whom he or she is entitled to look for support. The Public Defender, after referral, is entitled to represent a defendant if satisfied that the defendant is indeed indigent (G.L. 1956 [1981 Reenactment] § 12-15-9). However, if the Public Defender determines that the department cannot represent a defendant or that a conflict of interest would arise in doing so, then the Public Defender seeks the advice of the referring court in determining its capacity to represent the defendant within acceptable dictates of advocacy. In such cases, the court may assign private counsel to represent the defendant. *See, e.g.,* Superior Court Rules of Criminal Procedure 44; District Court Rules of Criminal Procedure 44. Payment for the services of such court-appointed private counsel is ordered and approved by the court. The Public Defender, however, is paid from public funds specifically appropriated for that purpose.

Thus, an attorney-client relationship is established between the Public Defender's office and a defendant by the court's referral of the defendant to the department and a determination of the defendant's current financial eligibility for the department's services on a case-by-case basis. It does not follow, therefore, that a defendant, once having been referred by the court to the Public Defender for representation in a particular criminal case, has created for himself or herself an attorney-client relationship with the department which obtains when he or she is sub-

sequently arrested and charged with another offense. However pro forma a court referral and an update of each defendant's eligibility may appear, the need for the fiscal accountability of the court for this aspect of justice is fundamental.

My brother Kelleher suggests in his dissenting opinion that in the light of constitutional developments set forth in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), § 12-15-3 should be amended to provide for a different method of creation of attorney-client relationship between the Public Defender and a potential client.

For reasons set forth in the majority opinion, with which I concur, I do not believe that *Miranda* mandates such a result. However, if our colleague believes the statute should be amended as he so often has observed in prior opinions, such a request is within legislative rather than judicial discretion.

BEVILACQUA, Chief Justice, with whom KELLEHER, Justice, joins, dissenting.

The sole issue in the instant case is whether the Fifth and Fourteenth Amendments require suppression of the post arrest confession of the defendant, Brian K. Burbine. Burbine contends that he did not knowingly and intelligently waive his constitutional rights to remain silent and to the presence of counsel prior to making his inculpatory statements because the police failed to inform him of Allegra Munson's availability as counsel during the interrogation process. *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Before reaching the question of waiver, however, a threshold determination must be made whether an attorney-client relationship existed between Burbine and Ms. Munson. That such a relationship existed is clear. The record indicates that Sheila Ray, Burbine's sister, contacted the Public Defender's office on behalf of Burbine, seeking the advice and assistance of assistant public defender Richard Casparian.[7] Thereupon, a staff attorney attempted unsuccessfully to contact Casparian and subsequently contacted Allegra Munson, another assistant public defender.

At approximately 8:15 p.m., Ms. Munson telephoned the Cranston police station. Her call was transferred to the detective division and the man who picked up the receiver stated, "Detectives." Ms. Munson then said, "My name is Aliegra Munson. I'm an attorney in the public defender's office. I'd like to inquire as to whether or not you are holding two people by the name of Burbine and Sparks." The man responded, "Yes. We've got them," or words to that effect. Ms. Munson then stated that Burbine was represented by Casparian and that if the police intended to put Burbine in any lineups or to question him, she would make herself available because Casperian was unavailable at that time. The man on the phone replied, "We're through with him for the night," and indicated that Burbine would be brought to court the following

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7. Richard Casparian was representing Burbine on a prior, unrelated charge. Sheila Ray told a staff attorney that because of his arrest, Burbine had been unable to keep an appointment that afternoon with Casparian concerning the other charge.

morning for arraignment on a breaking-and-entering charge. Ms. Munson was not told of the murder charge.

In *State v. Cline,* R.I., 405 A.2d 1192 (1979), we held that an attorney-client relationship arises from an agreement between the parties. We further held, however, that the agreement need not be a formal contract but may be implied by the conduct of the parties. In *Cline* an attorney was appointed to represent suspects who might be arrested over an Easter weekend on a murder charge and who requested counsel. We held that because an attorney-client relationship arises from a bilateral agreement, no such relationship existed *until* the suspect's request for counsel during in-custody interrogation because the parties had never met and probably were unaware of each other's existence prior to that time.

Contrary to *Cline,* in the instant case, an attorney-client relationship certainly was created prior to the custodial interrogation that resulted in Burbine's confession. This relationship arose by virtue of the fact that, prior to the interrogation, Burbine's sister telephoned the Public Defender's office seeking legal representation for Burbine, and, as a result of that call, Allegra Munson contacted the Cranston police station to advise Burbine.

Although Burbine was unaware that his sister had obtained counsel for him, it is well settled that a third party may retain an attorney on behalf of a suspect who is in custody. *See Commonwealth v. McKenna,* 355 Mass. 313, 244 N.E.2d 560 (1969); *State v. Haynes,* 288 Or. 59, 602 P.2d 272 (1979), *cert. denied,* 446 U.S. 945, 100 S.Ct. 2175, 64 L.Ed.2d 802 (1980); *Commonwealth v. Hilliard,* 471 Pa. 318, 370 A.2d 322 (1977); *State v. Jones,* 19 Wash.

App. 850, 578 P.2d 71 (1978). To hold otherwise would be to ignore the practical implications of the interrogation process. Most lawyers would agree that it is much more difficult for the person in police custody to seek counsel on his own behalf than for a family member or other third party to do so for him. Moreover, to prevent a family member or other third party from obtaining legal representation for a suspect would be tantamount to violating the suspect's Fifth Amendment right to counsel. As the court in *State v. Jackson,* 303 So.2d 734, 736 (La. 1974), held under similar facts and circumstances:

> "[T]he fact that a prisoner does not know [his] family has retained an attorney for [him], does not justify governmental officials to ignore [his] constitutional right to such counsel."

That an attorney-client relationship was created in the present case is further supported by our decision in *State v. Fuentes,* R.I., 433 A.2d 184 (1981). In *Fuentes* we held that such a relationship did not arise merely because the police knew that a particular attorney had represented the defendant in the past. We indicated, however, that such a relationship would arise if the attorney made it clear to the police that the attorney was representing the defendant and that the defendant was not to be questioned outside of the attorney's presence. In the instant case, Allegra Munson certainly fulfilled these conditions. Ms. Munson not only notified the police that she was representing Burbine but she also stated that she would be available to advise Burbine in the event he was

interrogated. Unquestionably, therefore, an attorney-client relationship was created prior to Burbine's confession.[8]

We now turn to the waiver issue. In addressing the question of waiver, the trial justice must explore the totality of the facts and circumstances surrounding the defendant's statement. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *State v. Fuentes*, *supra*. We will not disturb the trial justice's ruling on this issue unless our independent examination of the record of the motion to suppress, made in a light most favorable to the state, discloses that the ruling was clearly erroneous. *State v. Proulx*, R.I., 419 A.2d 835, 839 (1980); *State v. Benton*, R.I., 413 A.2d 104, 109 (1980). Based on such an examination of the record, I must find that the trial justice's ruling that Burbine knowingly and intelli-

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8. Even though I find that Allegra Munson represented Burbine in her capacity as private counsel, I would not find it fatal if Ms. Munson had so acted in her capacity as assistant public defender. General Laws 1956 (1981 Reenactment) § 12-15-3 imposes a duty on public defenders to represent and act as attorneys for indigent criminal defendants. Although the statute requires formal appointment of public defenders before they may represent indigents, to insist on strict compliance with the appointment procedure in the instant case would exalt form over substance.

As the Supreme Court held in *Miranda:*

"Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright*, 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (1963), and *Douglas v. California*, 372 U.S. 353 [83 S.Ct. 814, 9 L.Ed.2d 811] (1963)." *Miranda v. Arizona*, 384 U.S. 436, 472-73, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694, 722-23 (1966).

gently waived his Fifth and Fourteenth Amendment rights was clearly erroneous.

The record discloses that the police first interrogated Burbine concerning the death of Mary Jo Hickey shortly after Burbine had been taken to the Cranston police station on a breaking-and-entering charge. Following a tip that a man named "Butch," who lived at a certain Providence address, had killed Mary Hickey, a Cranston detective informed Burbine of his *Miranda* rights and asked Burbine if he knew of "Butch."[9] Burbine would not sign a waiver-of-rights form at that time. However, Burbine did answer that he was the only person named "Butch" living at the specified address. The interrogation then ceased.

As previously stated, at approximately 8:15 p.m., Allegra Munson telephoned the Cranston police station and spoke with a man who answered the phone in the detective division. The man informed Ms. Munson that Burbine was in custody. After identifying herself and notifying the man that she was representing Burbine, she asked the man if Burbine would be put into a lineup or questioned that evening. The man responded that the police were through with Burbine for the evening. Ms. Munson then stated that if Burbine were to be questioned, she would make herself available as counsel.

Contrary to the representations made to Burbine's attorney, the police questioned Burbine twice that evening

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9. The detective had previously asked D'Orio, who had been arrested with Burbine on the breaking-and-entering charge, the same question. D'Orio responded that Burbine was the only person called "Butch" who lived at that address.

and once the next day concerning the death of Mary Jo Hickey. On each occasion, the police informed Burbine of his *Miranda* rights and Burbine signed a waiver-of-rights form. However, the police never informed Burbine that Allegra Munson had agreed to be available if he were questioned. During the interrogation, Burbine signed three confessions stating that he had killed the victim. The first signed confession was obtained at approximately 10:20 p.m. The second signed confession was taken at approximately 11:20 p.m. The police obtained the third signed confession at 12:30 p.m. the following day.

The trial justice found as a fact that Allegra Munson did telephone the Cranston police station and that someone responded. He also found that there was no conspiracy or collusion by the Cranston police department to secrete Burbine from his attorney.

The waiver of a constitutional right must not only be voluntary but must also be a knowing and intelligent relinquishment of a known right or privilege. The determination of a valid waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466. In *Miranda* the Supreme Court reasserted these "high standards" as applicable to determinations of waiver of the privilege against self-incrimination during in-custody interrogation. *Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724; *see State v. Vargus,* 118 R.I. 113, 373 A.2d 150 (1977). It is well known that *Miranda* also established certain procedural safeguards that law enforcement officers must employ prior to

custodial interrogation to inform the suspect of his rights under the Fifth and Fourteenth Amendments. These safeguards are the now-familiar *Miranda* warnings that advise the suspect that he has the right to remain silent and the right to the presence of counsel.[10]

Because of the inherently coercive nature of the interrogation process, *Miranda* placed a heavy burden on the government to establish a knowing and intelligent waiver if the interrogation continues without the presence of counsel. Thus, the Court held that

> "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724.

Miranda further established that once the warnings are given, the suspect may invoke his Fifth Amendment rights at any time; and in such event, the interrogation must cease. Moreover, the court held that the prosecution may not admit into evidence any statements stemming from custodial interrogation unless it demonstrates that

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10. The specific *Miranda* warnings are as follows. The suspect must be informed.

"that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona,* 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

the warnings were given and that the suspect knowingly and intelligently waived his rights.

In the instant case, the trial justice found a valid waiver because Burbine was informed of his *Miranda* rights on three separate occasions and signed a waiver-of-rights form each time prior to making his inculpatory statements. However, as *Miranda* indicates, although strong proof of waiver, Burbine's express written statements of waiver do not necessarily establish that the waiver was knowing and intelligent. *Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724; *see North Carolina v. Butler,* 441 U.S. at 373, 99 S.Ct. at 1757, 60 L.Ed.2d at 292 (1979); *State v. Proulx,* R.I., 419 A.2d at 841.

Based on the totality of the facts and circumstances attending Burbine's inculpatory statements, I must find that Burbine did not knowingly and intelligently waive his Fifth and Fourteenth Amendment rights, specifically his right to the presence of counsel.[11] *See Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *North Carolina v. Butler,* 441 U.S. at 374-75, 99 S.Ct. at 1758, 60 L.Ed.2d at 293; *Johnson v. Zerbst,* 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466; *State v. Fuentes,* R.I., 433 A.2d at 191-92; *State v. Amado,* R.I., 424 A.2d 1057, 1061 (1981).

The critical factor supporting my position is that the police failed to notify Burbine of Ms. Munson's availabil-

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11. The Sixth Amendment right to the assistance of counsel attaches only after the commencement of judicial proceedings against the defendant. *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *State v. Fuentes,* R.I., 433 A.2d 184 (1981); *State v. Amado,* R.I., 424 A.2d 1057 (1981).

ity as his counsel during the interrogation process. Although a suspect has previously been informed of his abstract right to counsel and has waived that right, he must be informed when his counsel *actually* seeks to advise him and must knowingly and intelligently reject *such* opportunity before subsequent statements may be taken and used against him. *State v. Haynes,* 288 Or. at 70, 602 P.2d at 273. Thus, without knowledge of Ms. Munson's availability as counsel, Burbine could not make an informed waiver of his right to the presence of counsel. This holding is consistent with those of other jurisdictions. *See State v. Jackson,* 303 So.2d at 737; *Commonwealth v. McKenna,* 355 Mass. at 325, 244 N.E.2d at 566; *State v. Haynes,* 288 Or. at 70, 602 P.2d at 277; *Commonwealth v. Hilliard,* 471 Pa. at 322, 370 A.2d at 324; *State v. Jones,* 19 Wash.App. at 853, 578 P.2d at 73.

A brief recitation of the facts of two of the above cases will illustrate the similarity between those cases and the instant case.

In the recent Pennsylvania decision of *Commonwealth v. Hilliard, supra,* the defendant was given his *Miranda* rights prior to questioning concerning a murder charge. During this period, the defendant's wife contacted the Public Defender's office seeking representation for the defendant. When an assistant public defender arrived at the police station, the police denied him access to the defendant, asserting that the defendant had not requested counsel. The defendant subsequently made a confession. The court found that although the defendant had not requested counsel and, indeed, had waived his right to have counsel present during questioning, that waiver was invalid:

> "Appellant's failure to request counsel, when his attorney has been denied access and appellant has not been informed of his attorney's availability, cannot support a determination that he has waived his right to counsel." *Commonwealth v. Hilliard,* 471 Pa. at 322, 370 A.2d at 324.

Our neighboring state of Massachusetts reached the same result in *Commonwealth v. McKenna, supra.* In *McKenna* the defendant was arrested for murder at his home and advised of his rights. Before he was taken to the police station, he asked his aunt to contact his counsel. While the defendant was being questioned at headquarters, his counsel telephoned the police station and told the police sergeant that he represented the defendant and that the defendant should not be interrogated outside his presence. The sergeant gave evasive answers and continued questioning the defendant, who ultimately made inculpatory statements. The defendant was not informed of his counsel's availability. Although the defendant never requested counsel, the Supreme Judicial Court of Massachusetts held that whatever waiver existed prior to defense counsel's call became inoperative thereafter because the defendant "was entitled to know of his counsel's availability and, with that knowledge, to make the choice [whether to have counsel present] with intelligence and understanding * * *." *Commonwealth v. McKenna,* 335 Mass. at 324, 244 N.E.2d at 566.

In the instant case, the majority hypothesizes that knowledge of Allegra Munson's availability as his counsel would not have added significantly to the quantum of knowledge necessary for Burbine to make an informed waiver. To the contrary,

> "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advise whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family that fact may inspire additional confidence." *State v. Haynes,* 288 Or. at 72, 602 P.2d at 278.

Another factor supporting my finding that Burbine did not make a valid waiver is that the police effectively deprived Ms. Munson of a reasonable opportunity to consult with Burbine during questioning. In *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), the Supreme Court established that the state must afford an attorney reasonable access to his client during interrogation and strongly disapproved of such police misconduct as existed in the instant case:

> "It 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer seeking to speak with him, was kept away from him by the police.'" *Id.* at 487, 84 S.Ct. at 1763, 12 L.Ed.2d 984 (quoting *People v. Donovan,* 13 N.Y.2d 148, 152, 198 N.E.2d 628, 629, 243 N.Y.S.2d 841, 843 (1963)).

Jurisdictions have adhered to the reasoning of *Escobedo. See United States v. Springer,* 460 F.2d 1344, 1353 (7th Cir. 1972); *Coughlan v. United States,* 391 F.2d 371, 372 (9th Cir. 1968); *United States v. Wedra,* 343 F.Supp. 1183, 1185-87 (S.D.N.Y. 1972); *State v. Jackson,* 303 So. 2d at 737; *Commonwealth v. McKenna,* 355 Mass. at 325, 244 N.E.2d at 567; *Commonwealth v. Hilliard,* 471 Pa. at 322, 370 A.2d at 324; *State v. Jones,* 19 Wash.App. at 853-54, 578 P.2d at 72-73.

Although the trial justice found that in the present case there was no conspiracy or collusion on the part of the police to secret Burbine from his attorney, the assurance the police gave to Ms. Munson that Burbine would not be interrogated, upon which assurance she reasonably relied, was "as effective in preventing consultation as the physical barrier which confronted Escobedo's attorney at the jail house door." *United States v. Wedra,* 343 F. Supp. at 1186 (quoting *Coughlan v. United States,* 391 F. 2d at 375 (Hamley, C. J., dissenting)). Moreover, in the instant case, "[t]he focus must be on the rights of the accused, not the innocence or culpability of the police." *Commonwealth v. Hilliard,* 471 Pa. at 323, 370 A.2d at 324. Thus, in view of the heavy burden the government must meet to establish a valid waiver, the police cannot claim that Burbine knowingly and intelligently waived his right to counsel when their actions effectively deprived Ms. Munson of a reasonable opportunity to advise Burbine during the interrogation. *See Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724.

For the foregoing reasons, I would grant the motion to suppress the signed confessions taken from Burbine. This does not mean, as the majority asserts, that I adopt the so-called New York rule, under which a suspect may never waive his Fifth Amendment rights outside his counsel's presence. *See People v. Hobson,* 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *People v. Donovan,* 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). A suspect may, after being fully informed of the availability of counsel, knowingly and intelligently waive his rights without consultation with his attorney. *See Mir-*

anda v. Arizona, 384 U.S. at 478-79, 86 S.Ct. at 1629-30, 16 L.Ed.2d at 726. However, as the Supreme Court held in *Miranda,*

> "[w]ithout the protections flowing from *adequate warnings* and the rights of counsel, 'all the careful safeguards erected around the giving of testimony [at trial], whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" (Emphasis added.) [Citations omitted.] *Id.* at 466, 86 S.Ct. at 1624, 16 L.Ed.2d at 719.

Under the facts and circumstances of the instant case, it is apparent that the police failed to advise Burbine properly of his *Miranda* rights. In *Miranda,* the Supreme Court underscored the necessity of the presence of counsel to eliminate "the evils in the interrogation process." As the Supreme Court held:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." *Id.* at 469, 86 S.Ct. at 1625, 16 L.Ed.2d at 721.

To allow the police to interrogate, and elicit a confession from, a suspect without informing the suspect of his counsel's availability while effectively denying his counsel reasonable access, would promote those "evils" inherent in the interrogation process which *Miranda* condemned. I cannot support a result under which the procedural safeguards carefully created by *Miranda* to protect Fifth and Fourteenth Amendment rights would be reduced to a

meaningless ritual. In view of the foregoing, I must find that the defendant, Brian Burbine, did not knowingly and intellig ntly waive his Fifth and Fourteenth Amendment rights to counsel.

KELLEHER, Justice, dissenting.

I fully subscribe to the sentiments expressed by the Chief Justice. However, in view of the substantial inroads made today by the majority on the fundamental right against self-incrimination, I feel compelled to offer the following comments.

At the time of his arrest during the midafternoon of June 29, 1977, Brian Burbine was a twenty-one-year-old fifth-grade dropout. Although he now appears before us as a convicted murderer, when he was arrested that afternoon by the Cranston police and subsequently taken to the bowels of the Cranston police headquarters where the detective bureau is located, he was entitled to the plenary protection of the constitutional guarantees against compelled self-incrimination embodied in the Fifth Amendment to the Federal Constitution and in the declaration of rights of the Rhode Island Constitution, specifically, art. I, sec. 13. The procedural safeguards delineated in the *Miranda* case were designed to effectuate such guarantees. *State v. Perez,* R.I., 422 A.2d 913, 914-15 (1980). I for one do not believe they should be so easily evaded as they were in the case at bar.

With seemingly unquestioned acceptance my colleagues adopt the trial justice's incongruous findings that public defender Allegra Munson did in fact call the Cranston detective division and offer to be available should they wish to question Burbine but "that there was no con-

spiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney" despite the denials by all five of the officers involved in Burbine's interrogation of any knowledge of such a call. According to the testimony of these officers, Detective Ferranti and Lieutenant Ricard were the only Cranston police officers on duty in the detective division that evening. I have already alluded to the fact that the division is a self-contained unit within the department located in the basement of the Cranston station. The only other law-enforcement personnel present in this area during the critical hours of interrogation that night were Providence officers Captain Wilson, Lieutenant Gannon, and Detective Trafford.

In describing the system for routing incoming calls, the Cranston officers indicated that all such calls are first received by a main switchboard operator situated on the second floor of the building. Calls relating to a specific suspect in police custody would be relayed either to the officer on duty in charge of all department operations or to the detective division. The officer in charge of all departmental operations that evening testified that he had not received any calls regarding Burbine. He further indicated that if Ms. Munson had requested, as she testified, that her call be transferred to the detective division, it would have been routed there directly. I find it incredible on the record before us that someone other than one of the five officers who were the only persons present in the detective division, someone whom no one seems to be able to identify, could have answered Ms. Munson's call. The representations made to her that Burbine was indeed in the custody of the Cranston police but that he

would not be questioned or placed in a lineup that evening, that they were "through with him for the night," and that he would be arraigned in District Court the following morning dispel any notion that the individual responding to Ms. Munson's inquiry was but an unwitting custodian of the telephone on behalf of the detective division.

This court on numerous occasions has stated that a trial justice's factual findings in matters such as were presented at the suppression hearing will be disturbed only if they are clearly wrong. Findings will be classified as clearly wrong if, after reviewing all the evidence, this court is "left with the definite and firm conviction that a mistake has been committed." *State v. Amado,* R.I., 424 A.2d 1057, 1062 (1981); *State v. LaRosa,* 112 R.I. 571, 576, 313 A.2d 375, 377 (1974). The no-collusion finding, when cast in the light of all the evidence adduced at the suppression hearing, in my opinion was clearly wrong.

By its ruling today, the majority has made every police station throughout the state a potential privileged sanctuary for law-enforcement personnel in which interrogation of a suspect can proceed uninterrupted while the attorney hired by the accused's family is rendered powerless to do anything to ensure that the constitutional rights of someone's family member during such period of in-ustody questioning are protected. Consequently, the police gain in their powers of interrogation[12] as the thrust

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12. Mr. Justice Jackson, in discussing "the right of interrogation," realized that preserving the power of interrogation presented "a real dilemma in a free society" because subjecting one without counsel to questioning presented a real peril

(Continued on the next page)

of the *Miranda* safeguards go out the window, and the populace is left to wonder who responded to attorney Munson's inquiry and told her that there was no necessity to make herself available because the police were through with Burbine for the night and there would be no interrogation or lineup.

The majority's footnote 5, which attempts to eradicate any trace of collusion by suggesting the likelihood of confusion on the part of the members of the Cranston Police Department, is ingenious. However, ingenuity is no substitute for evidence. The record is devoid of any evidence to support the confusion theory. Not one of the police officers testified as to the existence of any confusion within the confines of the detective division. Rather, they were insistent that the call had never been made.

At the suppression hearing, the issue was very simple. Ms. Munson testified that her conversation with the detective division occurred at 8:15 p.m.; however, every detective who was in the division headquarters at 8:15 p.m. testified that no such call was made. The trial judge had a choice: he could have believed Ms. Munson or the police. He believed Ms. Munson and, in an effort to emulate Solomon, found no collusion, a conclusion entirely without any evidentiary support.

(Continued from the previous page)

to individual freedom whereas bringing in a lawyer impeded solution of the crime because "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59, 69 S.Ct. 1347, 1358, 93 L.Ed. 1801, 1808-09 (1949). The learned jurist, when he expressed those thoughts in 1949, was obviously unaware that some seventeen years later the Supreme Court with its *Miranda* pronouncements would opt to buttress the constitutional guarantee against self-incrimination.

It is my belief that when law-enforcement authorities have failed to admit counsel to a person in custody or to inform the person of the attorney's efforts to contact him, they cannot thereafter rely upon a suspect's "waiver" for the use against him of his subsequent uncounseled statements or evidence garnered as a result of such statements. This rule protects the suspect's rights under both the Federal and State Constitutions not to testify against himself, and in the event the United States Supreme Court takes the position now espoused by the majority, I would hold that the principle cited above would still be applicable under the pertinent provisions of the declaration of rights embodied in our state's constitution.

A few observations are warranted with regard to the fears expressed by my brother Weisberger that requiring law-enforcement personnel to inform suspects in their custody of calls by attorneys hired by or contacted by the suspect's families will encourage defense counsel and public defenders to forward the names of their recidivist clients to the various police departments throughout the state with instructions that they are to be notified in the event a client previously identified is arrested. The factual situation before us is, as the Chief Justice explains in his dissent, a far cry from that depicted in the majority's hyperbole. The hypothesized onslaught of general requests by unsolicited defense counsel to be notified should an individual whose name appears among a long list of names previously submitted by counsel to the police be arrested at some uncertain date in the future is precluded by the court's decisions in *Cline* and *Fuentes,* both *supra.* Moreover, I find it significant in this respect that the Providence police seemed to have had no difficulty in contacting and procuring the presence of Burbine's counsel when it either suited their convenience or served their purposes.

During interrogation at the Providence station the morning following his arrest and after the two confessions had been obtained at the Cranston station, an officer of the Providence police department called the Office of the Public Defender to request the presence of Burbine's counsel at a police lineup.[13] The officer and a staff member of the public defender's office testified that the call was made at about 12:05 p.m. on June 30. The third incriminating statement was obtained from Burbine that day at about 12:30 p.m. If the *Miranda* procedural safeguards are to have any meaning at all, their invocation cannot be at the discretion of the police when it is convenient for them to do so or advances their own purposes.

With all due respect to the majority, in my opinion its adherence to this unsubstantiated floodgates argument of "jailhouse lawyering" has blinded it to the harsh realities confronting an arrested suspect. Perhaps even more disturbing, the court's sanctions the erection of an impenetrable wall between the arrested suspect during the critical hours of in-custody interrogation and the suspect's family, oft-times the only supporting link the suspect may have at this time to the world outside the hostile environment of the police station.

I have one final remark to make. Mrs. Justice Murray's concurrence reminds us that the Office of the Public Defender first came into existence in 1941. An examination of the pertinent Rhode Island Manual indicates that in

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13. The Providence police gave conflicting versions concerning the reason an attorney was called. One officer stated that Burbine had requested an attorney. Another officer stated that Burbine did not want an attorney but the officer's supervisors insisted that Burbine have counsel present during the lineup.

1941 the public defender's professional staff consisted of two individuals, the public defender and an assistant. The Rhode Island Manual for 1977 reveals that at the time of Burbine's arrest the public defender's office consisted of the public defender, seventeen assistant public defenders, a chief investigator, and six assistant investigators. The growth in this office reflects the profound changes that have occurred within the criminal-law field since the implementation of the 1966 landmark *Miranda* decision. When the Legislature first established the office and described the duty of the public defender to "act as attorney for indigent defendants" upon referral by the Superior Court, it could not have anticipated the expansion of a suspect's prearraignment, in-custody constitutional rights mandated by the United States Supreme Court in *Miranda*. The rigid and mechanistic interpretation applied to G.L. 1956 (1981 Reenactment) § 12-15-3 by my sister Murray completely ignores this development of constitutional law with respect to in-custody interrogation and the procedural safeguards crafted in *Miranda* to which *all* persons are entitled irrespective of their financial status.

Evidently, the Providence police had no difficulty accepting the public defender as Burbine's duly authorized counsel even though no referral had been made by the Superior Court relating to the homicide case when they called the Office of the Public Defender to procure the presence of counsel at a police-station lineup. I would also point out that it is highly improbable that Burbine had enjoyed a ballooning of his financial assets since his previous completion of a financial questionaire that entitled him to representation by public defender Casparian on charges that were still pending at the time of his arrest on June 29, 1977. Moreover, it is obvious that any check

on Burbine's current net worth could not have been performed that evening when public defender Munson called to provide counsel to Burbine during the critical hours of interrogation.

Justice Murray's view, if followed to its logical conclusion, would create a dual system of justice—one for indigent persons and one for persons fortunate enough to afford private counsel. Those able to retain private counsel would be assured of the presence of their respective attorneys at the police station to serve as a buffer in the oppressive atmosphere of in-custody interrogation and to provide continuous legal advice whereas those who cannot afford private counsel would be forced to face the oppressive police-station atmosphere alone without any advice from counsel until such time as they were brought before a court for referral to the public defender's office.

Such a dual system, in my opinion, is a result never contemplated or intended by the General Assembly. General Laws 1956 (1981 Reenactment) § 12-15-9 places the responsibility of determining eligibility for the services of a public defender squarely with the Office of the Public Defender. When this provision is read in *pari materia* with § 12-15-3, there is nothing inconsistent with a preliminary determination by that office of an arrested individual's eligibility based upon the individual's oral representation of financial status or, as in this case, that of representations of a family member, so as to afford indigent persons the advice of counsel during in-custody interrogation to which they are just as much constitutionally entitled as those able to hire private counsel.

I respectfully dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1554

BRIAN K. BURBINE,

Petitioner, Appellant,

v.

JOHN MORAN,

Respondent, Appellee.

JUDGMENT

Entered: January 25, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to that court with directions that the habeas corpus is to be issued and petitioner released within 60 days of our mandate unless the state of Rhode Island has vacated the judgment of conviction and scheduled an early retrial.

By the Court:

Francis B. Scigliano
Clerk.

[cc: Ms. Rosin and Mr. Delbonis]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1554

BRIAN K. BURBINE,

Petitioner, Appellant,

v.

JOHN MORAN,

Respondent, Appellee.

ORDER OF COURT

Entered: February 19, 1985

Upon motion of appellee, to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by March 20, 1985 and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed.

By the Court:

Francis B. Scigliano
Clerk.

[cc: Ms. Rosin and Mr. DelBonis]

APPENDIX G

State #20 2/28
2-27-79

Thomas A. Palangio, Prin. Dept. Clk.

DATE: June 29, 1977 CR #———

RIGHTS

Time 9:30 p.m. Statement Taken By Lieut. B.E. Gannon

DATE 6/29/77

OFFICE OF Cranston Police Detective Bureau

I, Brian K. Burbine, having been informed that I am a suspect in the crime of Homicide voluntarily, without threats or promises on the part of the police, make the following statement to members of the Providence Police Department after having been advised that:

1. I do not have to give a statement.
2. I have the right to remain silent.
3. Anything I say can and will be used against me me in a court of law.
4. I have the right to the presence of an attorney prior to and during any questioning by the police.
5. I have the right to the presence of an attorney dur ng a lineup or confrontation of witnesses, if any line-up or such confrontation takes place.
6. If I cannot afford an attorney, one will be appointed for me prior to any questioning, if I so desire.

I further admit and agree that:

7. After having been informed of my constitutional rights, I do understand these rights, and I agree to give a statement at this time.

8. I do not want an attorney called or appointed for me at this time.

Brian Burbine
Signature

WITNESSES: Lieut. Bernard E. Gannon
Det. E. J. Trafford
(illegible), Notary 6-29-77

APPENDIX H

STATEMENT BY THE DEFENDANT

Ind. 77-1401
State #19 2/28
(4 Parts)
2-27-79

Thomas A. Palangio, Prin. Clk.

CR #———

TIME 9:30 p.m.
DATE 6/29/77
PLACE Cranston P.D.

I, Brian K. Burbine, voluntarily, without threats or promises, make the following statements having been advised of my rights to consult with an attorney, to refuse to make a statement and that the statement I am about to make can and will be used in a court of law against me and if I cannot afford an attorney one will be provided for me prior to questioning.

Q. What is your name?

A. Brian K. Burbine

Q. What is your present address?

A. 306 New York Ave. Providence, R.I.

Q. What is your date of birth?

A. 10/23/56

Q. What is your occupation?

A. Painting, part time

Q. Brian, I have notified you of your Constitutional Rights and you have stated that you understand these rights and that you will give me a statement in regard to the death of Mary Jo Hickey. I have informed

you that you are a suspect in this homicide. I now want to inform you that you can terminate this statement at any time you so desire and that you can obtain a lawyer at any time during this interrogation. Do you understand what I have told you and do you wish to give a statement?

A. Yes.

Q. On March third a woman I will identify as Mary Jo Hickey was found beaten and eventually died of the injuries suffered in this assault. Are you the person responsible for Mary Joe's death?

A. Yes.

Q. Will you tell me in your own words what occurred on the night that she was injured?

A. I knew Mary Jo from before. I met her through my mother. She stayed with me and my mother at our house on Goddard Street. A couple of times she fooled around with me, you know, grabbed me and stuff like that.

(Continue Statement on Separate Page)

/s/ Brian Burbine
Signature

Statement Taken By: Lieut. Bernard E. Gannon

Witnesses: Det. E. J. Trafford

Notary Public: (illegible) 6-29-77

STATEMENT CONTINUATION FORM

CR # DATE 6/29/77 PAGE #2

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

A. (Con't from page one) . . . Then I seen her down city quite a bit. I would see her in bars and talk to her. She would start talking to me and sort of lead me along and then leave me and go off with some other

guy. Then I seen her the night that it happened. I seen her in Jimmy's on Mathewson Street. I went in and she was with some blond girl. She called me over and we started talking and she started making out with me. I bought her a couple of drinks and she asked me if I had a car. I told her yes. She asked me for a ride home. We left there and walked toward my car. On the way she told me that she wanted to stop in the Pier 76. We went into the Pier and had a few more beers and then we left and went to my car. While we were driving she had her hand on my leg. I took her to a parking lot that sits way in the back off Elmwood Ave. There were a couple of trucks parked there, and I started making out with her. Then she shut me off and told me that she wanted to go home, I lost my head and started to hit her. I guess I just blacked right out. The next morning when I got up I looked at my hand and it had all cuts on it. Then I went down to my car and there was blood all over my car, it was on the door the seat and the window. I cleaned the blood out of the car as best I could. Later my mother showed me in the paper that Mary Jo had been hurt and I got sick. I ran into the bathroom. . . . Then when I came out I told my mother that I wanted to talk to her alone, I went into her bedroom and I told my mother the whole story. After this I decided to go to Maine to try to decide what I should do. I went to Maine and stayed with Donald Sparks and his sister. I kept calling down to Providence, to my mother and sister to find out what was happening. Then one day my sister called and told me that Mary Jo had died. I broke down and told Sparks and his sister, nancy, what I had done. After that i came back to Providence. Thats about it.

Q. Do you remember hitting Mary Jo with a pipe or any other object?

A. No.

Q. Did you have sex with her that night?

A. No.

/s/ Brian Burbine
Signature

WITNESSES: _____
Det. E. J. Trafford

NOTARY: (illegible)
6-29-77

STATEMENT CONTINUATION FORM

CR # _____ DATE 6/29/77 PAGE #3

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

Q. Showing you a photo which I have written #1, Lieut. BEG, 6/29/77, on the back of, can you identify the person in this picture?

A. Yes, thats Mary Jo.

Q Showing you a photograph, marked #2, EJT, 6/29/77, can you identify this photo?

A. Yes, thats the parking lot that we pulled into.

Q. Showing you a photograph marked #3, EJT, 6/29/77, can you identify this photo?

A. Yes, thats where it happened, I remember seeing the trucks when we pulled in.

Q. Will you describe the auto that you were driving the night of this incident, and tell me where the auto is at the present time?

A. It is a 1966 Mercury Comet, two door. It was registered to my sister, Shelia Ray. I don't remember the plate number. It was white with a black top. My sister sold it to a guy, as far as I know he has a picture place on Westminster Street next to Union Loan Company.

Q. How many people have you told that you the the person responsible for Mary Joe's death?

A. My mother, my sister, Sparks and his sister.

Q. What was your hair style at the time of this incident?

A. My head was shaved.

Q. Can you describe to me what you were wearing the night of this incident?

A. I can't remember.

Q. Can you tell me the reason that you

/s/ Brian Burbine
Signature

WITNESSES: _____
Det. E. J. Trafford

NOTARY: (illegible)
6-29-77

STATEMENT CONTINUATION FORM

CR #——— DATE 6/29/77 PAGE #4

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

Q. (Con't from page 3) . . . beat mary Jo so badly?

A. I had been drinking and I had taken four valliums, I just don't know. I remember hitting her and then I guess I just blacked out. When I saw the blood in my car the next day it came back to me. It has been bothering me ever since.

Q. Butch, is there anything that you would like to add to this statement?

A. I didn't mean for anything like this to happen.

Q. Is this a true statement, make of your own free will without any threats or promisses on the part of the Providence Police or the Cranston Police?

A. Yes.

Note: Statement completed at 10:20 pm.:

/s/ Brian Burbine
Signature

WITNESSES: _____
Det. E. J. Trafford

NOTARY: (illegible)
6-29-77

APPENDIX I

RIGHTS

CR #————————
TIME 11:20 pm
STATEMENT TAKEN BY Lieut. B. E. Gannon
DATE 6/29/77
OFFICE OF Cranston Police Detective Bureau

I, Brian K. Burbine, having been informed that I am a suspect in the crime of Homicide, voluntarily, without threats or promises on the part of the police, make the following statement to members of the Providence Police Department after having been advised that:

1. I do not have to give a statement.
2. I have the right to remain silent.
3. Anything I say can and will be used against me in a court of law.
4. I have the right to the presence of an attorney prior to and during any questioning by the police.
5. I have the right to the presence of an attorney during a lineup or confrontation of witnesses, if any line-up or such confrontation takes place.
6. If I cannot afford an attorney, one will be appointed for me prior to any questioning, if I so desire.

I further admit and agree that:

7. After having been informed of my constitutional rights, I do understand these rights, and I agree to give a statement at this time.

8. I do not want an attorney called or appointed for me at this time.

Ind. 77-1401
State #21 2/28
2-27-79
Thomas A. Palangio
Prin. Clk.
/s/ Brian Burbine
Signature

WITNESSES: Lieut. BE Gannon
Det. E. J. Trafford
6-29-77 (illegible)

APPENDIX J

DATE June 29, 1977 CR #——

STATEMENT BY THE DEFENDANT
(1 of 2 parts)

Ind. 77-1401
State #22 2/28
2-27-79
Thomas A. Palanjio

TIME 11:20 pm
DATE 6/29/77
PLACE Cranston Police Det. Div.

I, Brian K. Burbine, voluntarily, without threats or promises, make the following statements having been advised of my rights to consult with an attorney, to refuse to make a statement and that the statement I am about to make can and will be used in court of law against me and if I cannot afford an attorney one will be provided for me prior to questioning.

Q. What is your name?

A. Brian K. Burbine

Q. What is your present address?

A. 306 New York Ave. Prov. R.I.

Q. What is your date of birth?

A. 10/23/56

Q. What is your occupation?

A. Painter, Part time

Q. Brian, I have allready taken a statement from you concerning the death of Mary Jo Hickey. You have stated that you now remember some additional facts concerning this incident. I have again notified you

of your rights and want to insure that you understand these rights. Do you have any questions concerning your Constitutional Rights?

A. No.

Q. I explained to you before that you can obtain a lawyer at any time you desire and that you can terminate this statement at any time you desire. Do you understand this?

A. Yes.

Q. You stated that you remembered something concerning a glass. Will you tell me what it is you remembered?

/s/ Brian Burbine
Signature

Statement taken by: Lieut. BE Gannon

WITNESSES: /s/ Lieut. BE Gannon
/s/ Det. E. J. Trafford
(illegible)
Notary 6-29-77

STATEMENT CONTINUATION FORM

Ind. 77-1401
State #22 2/28 (2 of 2 parts)
2-27-79
Thomas A. Palangio, Prin. Clk.
CR #———— DATE 6/29/77 PAGE #2

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

A. I remember that the last drink that she ordered before we left the Pier 76 was a mixed drink. She took the glass with her, she was drinking it when we left.

Q. Do you recall what clothing you were wearing the night of this incident and where are these clothes at the present time?

A. I had my red toke on that night. I'm not sure if I was wearing it or not but I had my red toke. I had

my black wind-breaker on, it has a red linning. The wind-breaker is in my closet, in my bedroom on New York Avenue. The hat is in the wash basket in the cellar on New York Avenue.

Q. Did Mary Jo have a pocketbook with her that night?

A. Yes she had one with her.

Q. What happened to the pocketbook?

A. I don't know. The only thing that I found in my car the next day was a pack of Winston 100's.

Q. Would you remember if you placed the pocketbook somewhere?

A. I all-ready told you, I remember starting to hit her and then everything is sort of hazy, the next morning when I saw the blood in my car is when everything started to come back to me.

Q. Do you remember seeing anyone else that you know on the night that the incident happened?

A. Mary Jo was sitting with a blond girl and she introduced me to her in Jimmy's Cafe. I bought her a drink. She was a tall girl and had a medium build. She was having trouble with her boy friend or something.

Q. Is this a true statement, made of your own free will without any threats or promisses on the part of the Providence Police?

A. Yes.

/s/ Brian Burbine
Signature

WITNESSES: /s/ Lieut. BE Gannon
/s/ Det. E. J. Trafford

NOTARY: /s/ (illegible)
6-29-77

APPENDIX K

RIGHTS

TIME 11:55 AM
STATEMENT TAKEN BY Det. E. J. Trafford
DATE 6-30-77
OFFICE OF Detective Division

I, BRIAN K. BURBINE, having been informed that I am a suspect in the crime of HOMICIDE, voluntarily, without threats or promises on the part of the police, make the following statement to members of the PROVIDENCE Police Department after having been advised that:

1. I do not have to give a statement.
2. I have the right to remain silent.
3. Anything I say can and will be used against me in a court of law.
4. I have the right to the presence of an attorney prior to and during any questioning by the police.
5. I have the right to the presence of an attorney during a lineup or confrontation of witnesses, if any line-up or such confrontation takes place.
6. If I cannot afford an attorney, one will be appointed for me prior to any questioning, if I so desire.

I further admit and agree that:

7. After having been informed of my constitutional rights, I do understand these rights, and I agree to give a statement at this time.
8. I do not want an attorney called or appointed for me at this time.

Ind. 77-1401

2/28

State #24
2-28-79

Thomas A. Palangio
Prin. Clk.

/s/ Brian Burbine
Signature

WITNESSES: /s/ Det E. J. Trafford

APPENDIX L

STATEMENT BY THE DEFENDANT

Ind. 77-1401
State #23. 2/28
1 of 2 parts
2/29/79 Thomas A. Palangio, Prin. Clk.

TIME 12:05p.m.
DATE 6-30-77
PLACE 209 Fountain St

I, Brian K. Burbine, voluntarily, without threats or promises, make the following statements having been advised of my rights to consult with an attorney, to refuse to make a statement and that the statement I am about to make can and will be used in a court of law against me and if I cannot afford an attorney one will be provided for me prior to questioning.

Q. What is your name?

A. Brian K. Burbine

Q. What is your present address?

A. 306 New York Ave., Prov R.I.

Q. What is your date of birth?

A. 10-23-56

Q. What is your occupation?

A. Painter part time

Q. Brian I am again notifying you of your rights and have again asked you if you understand these rights. You have said you do and are willing to give a statement and answer further questions in this matter. You may stop this statement at any time you wish. Do you understand these rights and do you wish to continue?

A. Yes.

Q. Brian can you describe the clothing you were wearing on the night of this incident in which you have stated that you assaulted Mary Jo Hickey?

A. I had on a hat and coat. The hat was a red and white toke and the coat was a black windbreaker with red fur lining.

Q. I show you a red and white toke marked EJT 6-30-77, is this the hat you were wearing that night?

A. Yes.

Q. I show you a coat, a black windbreaker with a red fur like lining. Is this the jacket you were wearing that night?

A. Yes.

/s/ Brian Burbine
Signature

Statement Taken By: /s/ Det. E. J. Trafford

POLICE NARRATIVE

I swear that the facts which follow are true to the best of my knowledge:

State #23
2 of 2 Parts

Page 2 of statement of Brian K. Burbine Cont.

Q. Brian, looking at the coat, do you know when the last time was that you wore this coat?

A. No.

Q. Did you do anything to the coat when you got home the next day?

A. No.

Q. Do you remember the last time you wore the hat?

A. After I was up in Maine I stopped wearing it.

Q. Can you tell me anything else about this clothing?

A. After I came back from Maine I just put them both in the closet and that was the last time I remember using or seeing these clothes.

Q. Do you remember what type of shoes you were wearing on the night you were with Mary Jo Hickey?

A. No.

Q. I show you a pair of eggshell white shoes with raised soles and three inch heels marked EJT, are these your shoes?

A. Yes.

Q. Were you wearing these shoes on that night?

A. I didn't have them then.

Q. I show you a pair of brown boots, are thrse your boots?

A. Yes. But I didn't use them because the heels were messed up on them.

Q. Brian is there anything else that you would like to add to this statement at this time?

A. No.

Q. Is this statement given by you of your own free will without any threats or promises on the part of the Providence Police?

A. Yes.

Signed and sworn to before me at /s/ Brian Burbine
Signature

on this .

Statement taken by Det E. J. Trafford

APPENDIX M

FEBRUARY 21, 1979—MORNING SESSION
(Defendant present)

THE COURT: Good morning, Ladies and Gentlemen.

MISS MC GUIRL: Morning, your Honor.

THE COURT: The matter presently pending before the court is the defendant's motion to suppress the three confessions, or written statements, allegedly made by him. The first two were made in the Cranston Police Station on the evening of the 29th day of June of 1977. The third statement was allegedly made by the defendant in the Providence Police Station the following afternoon. The afternoon of June 30, 1977.

The defendant is alleging that these statements were not voluntarily made. Several people have taken the stand during the last three days and testified during the course of this suppression hearing. The first person to testify was Captain Milton Wilson of the Providence Police Department who really had very little to do with this investigation. He was simply called there to supervise Lt. Bernard Gannon and Detective Trafford from the Providence Police Department in their investigation. He was called by Detective Nicholas Ferranti (p. 2) of the Cranston Police Department who allegedly said that this defendant might possibly have been involved in a homicide which took place in the City of Providence.

Lt. Gannon testified that he advised this defendant of his rights on at least two occasions. That he

verbally explained the so-called Miranda Warnings to him. He read them to him. And that after they were explained to this defendant, that he freely and voluntarily and intelligently waived his rights and indicated this by signing the rights form. He signed two of these rights forms. The first statement that was given by this defendant started at approximately 9:30 and concluded at approximately 10:20 on the evening of the 29th of June. A subsequent statement was also taken by Lt. Gannon and Detective Trafford. Gannon's testimony was more or less corroborated by Detective Trafford.

Also, Barbara Hurst from the Office of the Public Defender testified that she received a call from one Shiela Ray indicating that her brother was being held at the Cranston Police Station, and that he was unable or had been unable to keep an appointment with Attorney Richard Casparian at 4:00 o'clock in the afternoon on the 29th day of June. Barbara Hurst called Allegra Munson, another member of the Public Defender's Office, (p. 3) and Allegra Munson took the stand and testified that she called the Cranston Police Station shortly after 8:00 P.M. on the evening of the 29th day of June. She testified that she spoke with someone at the station, she does not know who, and she asked this person whether or not Sparks and Burbine were being held by the Cranston Police. The answer was in the affirmative. She also asked whether or not they were going to be questioned or placed in a lineup. The person at the Cranston Police Station, whoever that might have been, indicated that the two defendants had been processed. They were

through with them. And once hearing that, Miss Munson indicated that she would not respond to the station.

Lt. Riccard from the Cranston Police Department testified that he did not receive a call that evening from Miss Munson. Detective Nicholas Ferranti also testified that he did not receive a call from Miss Munson. And Lt. Ernest DelMonico of the Cranston Police Station also testified that he did not receive a call from Allegra Munson on that evening.

The court is satisfied that the call was made and that someone responded, whoever that person might have been. The court is also satified that there was no (p. 4) conspiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney, whoever that might have been.

Also, the testimony is uncontradicted that Richard Casparian had represented this defendant in the past. And that he did in fact have an appointment with him on the afternoon of the 29th day of June of 1977.

Also, the facts are uncontradicted that at approximately 3:00 o'clock on that afternoon this defendant, another person by the name of Sparks, and a third party, were arrested in the City of Cranston by Detective David Bell, or Officer David Bell, and taken to the Cranston Police Station and charged with a Breaking and Entering Charge.

Nicholas Ferranti testified that he had received a telephone call or a tip from a person known to him,

two days prior on the 27th day of June, indicating that a person by the name of Butch who lived on Ocean Avenue in the City of Providence might have been involved in a homicide. Detective Ferranti, once Burbine was in custody on the B & E Charge, noticed the address of 206 Ocean Avenue in the City of Providence. He testified that he asked Mr. Burbine whether or not he knew anyone (p. 5) by the name of Butch that lived at that address or in that vicinity. This defendant stated that his name was Butch. And Ferranti asked him if he knew anyone else by that name in the area. And this defendant said that he was the only Butch in that particular area. This put Ferranti on notice. He in turn called the Providence Police Department and they responded to the station. Mr. Burbine has taken the stand and testified, yes the rights form was placed in front of him. However, it was not explained to him. He had testified that he had been drinking earlier that day, that he was somewhat under the influence of intoxicating beverages. And he testified that he really didn't understand what the rights were all about.

It is the function of the trial Judge at this stage of the proceedings to determine, Number 1, whether or not the so-called Miranda Warnings were in fact given to the defendant, and whether or not he intelligently, knowingly, and voluntarily waived his constitutional right against self-incrimination, his right to remain silent, and also his right to have an attorney present during any questioning. If in fact the (p. 6) court finds that he voluntarily, knowingly, and intelligently waived his constitutional rights and made

a statement, was that statement made voluntarily without any threats or promises of reward or coercion to any degree whatsoever?

The court is satisfied, after going over all of the testimony of the numerous witnesses who testified during the course of the suppression hearing, that the rights were in fact verbally given to this defendant. The court is also satisfied that this defendant signed the waiver forms on three separate occasions. And that when he signed those waiver forms, that he knowingly, intelligently, and voluntarily waived his privilege against self-incrimination. And also his right to counsel.

The court is also satisfied that during the course of the interrogation, that he was not coerced, he was not threatened, he was not promised anything in return for his statements. And the three statements that were given were in fact given voluntarily.

The defendant has an absolute constitutional right to request the presence of an attorney during the course of any interrogation once he is a suspect in a (p. 7) particular crime. And the court, however, is satisfied after going over the evidence in this particular hearing that he never did in fact request the services of an attorney.

It came to the attention of the Public Defender's Office that this defendant was being held. However, it is not the right of the attorney, it is the right of the defendant to request a lawyer.

The court finds as a fact that Mr. Burbine never did in fact request the services of an attorney. If he

had requested a lawyer or said, "I don't want to say anything." and the police had continued to interrogate him, obviously, any subsequent statements or confessions would be invalid. However, I am satisfied after going over all of the testimony in this suppression hearing that that is not the case. I will, therefore, deny the defendant's motion to suppress the three statements.

MR. CASPARIAN: Could I kindly note for the record my objection to your Honor's ruling, please?

THE COURT: Yes. Then, of course, it will ultimately be the function of the jury to determine whether or not these rights were made and any statements were voluntarily given. Are we ready to start selecting a jury?